IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA

EASTERN-WATERLOO DIVISION

ROBERT E. WEMARK,
Petitioner,
vs.
JOHN MATHES,
Respondent.

No. **C00-2023-MWB**

REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF *HABEAS CORPUS*

TABLE OF CONTENTS

I. INTRODUCTION

This matter is before the court on the petition for writ of *habeas corpus* (Doc. No. 3) filed by the petitioner Robert E. Wemark ("Wemark"). Wemark filed a brief in support of his petition on August 22,

2000 (Doc. No. 13), and the respondent (the "State") filed a brief in resistance on October 20, 2000 (Doc. No. 18). Wemark filed a reply brief on December 21, 2000 (Doc. No. 25). On December 22, 2000, the State filed an objection to Wemark's reply brief (Doc. No. 25), to the extent the reply brief appears to assert a new claim of actual innocence. The court **sustains** the State's objection, but only to the extent the reply brief attempts to raise any new claim of actual innocence. The court otherwise will consider the reply brief for purposes of Wemark's claims.

The court previously denied Wemark's request for evidentiary hearing (*see* Doc. No. 21, entered October 19, 2000).

The court finds this matter now is ready for decision, and makes the following report and recommendation.

II. FACTUAL AND PROCEDURAL BACKGROUND

Wemark has brought this action to challenge his conviction for first-degree murder in August 1993. Wemark filed a timely direct appeal, an action for postconviction relief, and an appeal from the denial of postconviction relief. Wemark raises a single issue in this *habeas* action. He argues his trial counsel was ineffective in causing disclosure to the State of the location of a knife Wemark used to stab his wife. Wemark describes his claim as follows:

The Supreme Court of Iowa found the decision by [Wemark's] counsel to disclose to the prosecutor the location of the knife allegedly used by [Wemark] to kill his wife, Melissa Wemark, unsupportable. Notwithstanding, post-conviction relief was denied on the ground [Wemark] failed to make what the Court maintained was a necessary showing of prejudice to establish ineffective assistance of counsel. The Court erred in two respects. First, the Court trivialized the impact of trial counsel's disclosure of the location of the alleged murder weapon. [Wemark] had clearly established the crushing prejudice resulting from his counsel's breach. Second, the Court imposed a showing of prejudice where none was required. The actual breakdown of the adversarial process - trial counsel was cooperating with the prosecution and protecting his own self-interests - justifies a presumption of ineffectiveness.

Doc. No. 3, ¶ 12(A).

Relevant factual findings by the Iowa courts, which are presumed correct for purposes of this action,[(1)] are as follows. The PCR court set forth the facts underlying Wemark's conviction:

1. On January 19, 1993, the applicant Robert E. Wemark killed his wife Melissa Wemark at his home in Ridgeway, Winneshiek County, Iowa. Melissa Wemark was stabbed 15 times. Four of the wounds to her back were fatal wounds. However, anywhere from 10 to 30 minutes would have elapsed between the wounds and her death. With proper, prompt medical attention she could have survived.

2. Following the stabbing, Robert Wemark attempted to clean up the home. The murder weapon, a knife, was left in the home in a pile of junk located in the home's basement. Wemark then left the area with his two-year-old son. On January 20, 1993, Dickinson County Sheriff's Department followed a trail of bloody garments in the snow to the home of Merwyn Shorey located in rural Dickinson County. There

they found Robert Wemark lying on the floor suffering from self-inflicted gunshot wounds.

Also on January 20, 1993, the body of Melissa Wemark was found in the Ridgeway residence.

Wemark told medical personnel and law enforcement officers that on the previous morning he had fought with his wife and she had "fallen on a knife".

Doc. No. 19, Tab 3, at 1-2 ("Findings of Fact, Conclusions of Law, Judgment Order," filed March 4, 1998, *Wemark v. State*, No. LACV022826 (Winneshiek County District Court) ("PCR Order")).

The Iowa Supreme Court discussed at length the facts particularly relevant to the issue Wemark raises here:

Wemark was represented at his trial by two experienced criminal defense lawyers. Prior to trial, the two lawyers filed a notice of intent to rely upon the defense of diminished responsibility. They were confronted with an abundance of evidence gathered by law enforcement which pointed to Wemark as the perpetrator of the crime. His wife had been found dead in his home with stab wounds to her neck, chest, and back. The crime scene had been cleaned, and certain clothing had been washed. However, law enforcement authorities followed a trail of bloody clothing to an abandoned farm house where Wemark was found in a fetal position with two self-inflicted gunshot wounds. Wemark initially told authorities his wife had fallen on a knife, but he later admitted to stabbing her. There was also evidence Wemark was upset about the estrangement from his wife and had made a statement in the past inferring an intent to end the marriage with a murder-suicide. Wemark gave conflicting accounts to authorities about the location of the rifle he used to shoot himself. Investigators eventually discovered the rifle with Wemark's help, but were unable to find the knife during the months following the incident despite a prolonged search of the home.

Defense counsel employed a medical expert prior to trial to conduct a psychiatric examination of Wemark in an effort to obtain evidence to support the defense of diminished capacity. The expert examined Wemark and reported to defense counsel that he was unable to substantiate the defense.

Wemark was also scheduled to be examined by Dr. Michael Taylor, a medical expert employed by the State after Wemark filed his diminished responsibility defense. Before the scheduled interview, Wemark disclosed the location of the knife he used to stab his wife to his counsel. He had placed the knife in a pile of automotive parts under the basement steps of the house, which law enforcement authorities failed to detect during their extensive search of the home.

Defense counsel were immediately concerned they had an ethical obligation to disclose the location of the knife to the prosecution. They considered nondisclosure to be the same as concealment and an interference with police investigation. They solicited general opinions based upon hypothetical facts from a judge and three experienced lawyers, who all confirmed the presence of an ethical dilemma. However, some of the opinions may have been premised on the assumption that the knife was in the possession of defense counsel. Nevertheless, defense counsel concluded they had three options to pursue once Wemark informed them of the location of the knife. The first option was to wait for the State to search the house again and find the knife. Yet, defense counsel believed it was unlikely law enforcement would search the home a second time. The second option was to have Wemark inform Dr. Taylor of the location of the knife during the scheduled interview. Defense counsel knew Dr. Taylor would then notify the prosecutor. The third option was to engage the services of an attorney to relay the location of the knife to the prosecutor without disclosing the source of the information.

Defense counsel believed the second option could be used to Wemark's benefit. They felt voluntary disclosure could be used at trial to bolster Wemark's credibility and show the ineptitude of the police investigation. Additionally, defense counsel felt it was beneficial to Wemark to keep his scheduled appointment with Dr. Taylor despite the findings of their own expert witness. They hoped Dr. Taylor might bolster the defense of diminished responsibility.

Defense counsel informed Wemark of the ethical dilemma and the three options. They urged him to keep the appointment with Dr. Taylor and to disclose the location of the knife during the course of the examination.

Wemark was subsequently interviewed by Dr. Taylor. He informed Dr. Taylor of the location of the knife. Dr. Taylor then relayed the information to the prosecutor and the knife was removed in a second search of the home. The knife was introduced into evidence at trial and displayed by the prosecutor in closing argument. The State also conducted forensic tests on the knife prior to trial and was unable to find any fingerprints but did find traces of blood consistent with characteristics of Melissa's blood. This evidence was introduced at trial, as well as the location of the knife. Wemark claims the location of the knife should not have been disclosed, and the ability of the State to introduce it into evidence at trial prejudiced his defense.

Wemark v. State, 602 N.W.2d 810, 812-13 (Iowa 1999).

The Iowa Supreme Court noted the PCR court had found Wemark's trial counsel "exercised reasonable trial strategy by allowing Wemark to meet with Dr. Taylor and by encouraging him to disclose the location of the knife . . . [and] also found the admission of the knife into evidence at trial did not result in prejudice to Wemark." 602 N.W.2d at 814.

The Iowa court examined the performance of Wemark's trial counsel pursuant to the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, the U.S. Supreme Court held that to prevail on a claim for ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) (emphasis added). The Iowa court began by discussing at length the law relating to the dilemma faced by Wemark's attorneys, noting "[t]he decision by defense counsel to disclose the location of the knife implicates a legal principle deeply rooted in history. The concept that communications between a lawyer and client are absolutely privileged from disclosure is the oldest of all privileges involving confidential communications and has been firmly entrenched in English law since the reign of Elizabeth I over 400 years ago." *Wemark*, 602 N.W.2d at 815 (citations omitted). The court discussed both the historical attorney-client privilege, and the more recent rules of professional responsibility, explaining, in part, as follows:

Under our rules of professional responsibility, a lawyer is not, except under special circumstances, permitted to reveal confidential information of a client and may not use it to the disadvantage of the client. . . . On the other hand, a lawyer is not permitted to suppress evidence the law requires to be revealed or produced, . . . [and] may not 'conceal or knowingly fail to disclose' matters in the representation of a client which are required by law to be revealed. . . .

Nevertheless, the legal responsibility imposed upon lawyers who learn of the existence of tangible evidence of a completed crime in the course of an attorney-client relationship is complex and far from settled. Moreover, a lawyer can be faced with a host of conflicting important obligations to balance, including the duty to preserve client confidences, investigate the case, and maintain an allegiance to the system of justice as an officer of the court. Two legal principles, however, seem to have emerged from the conundrum generated by the privilege which find common agreement.

The beginning premise is a lawyer may not rely upon the privilege to "actively participate in hiding [a fruit or instrumentality of crime], or take possession of it in such a way that its discovery becomes less likely." . . . The second premise . . . is the attorney-client privilege protects statements by a client revealing the location of the fruits or instrumentality of a completed crime. . . . The main rationale for the rule requiring disclosure of the fruits and instrumentalities of the crime when taken into possession by the lawyer is that a lawyer must not impede or inhibit the discovery of evidence by the state. . . . However, if defense counsel leaves the evidence alone, the only matter possessed is the communication which remains insulated from disclosure by the attorney-client privilege. . . . Thus, a defense lawyer has no legal obligation to disclose information about the location of an instrument of a crime when possession of the instrument is not taken. . . . Instead, a defense lawyer has a duty to preserve the confidences of the client.

602 N.W.2d at 816-17 (citations omitted).

The Iowa court found that although "[d]isclosure may be justified as a tactical choice or strategy," 602 N.W.2d at 817, in Wemark's case, defense counsel's decision to disclose the knife's location was "premised upon ethical concerns which did not require disclosure." The court held:

Although tactical reasons were also considered, these tactics were a response to the faulty premise, not underlying reasons to disclose privileged information. Wemark was informed by his defense counsel that the location of the knife must be disclosed, and tactics were developed as a means to deal with the disclosure. Tactics or strategy cannot support disclosure in this case.

Id.

Having found Wemark's trial counsel's performance to be deficient, the court went on to examine the second prong of the *Strickland* test; that is, whether Wemark had established prejudice as a result of his counsel's ineffectiveness. The court found:

There was overwhelming evidence that Wemark repeatedly stabbed his wife with the knife. Wemark did not deny the stabbing but claimed self-defense, lack of premeditation, and provocation. Although the location of the knife and the forensic evidence discovered from the knife ultimately may have been more helpful to the State than the defense, there was an abundance of other evidence to support premeditation and the lack of provocation independent of the knife. The knife was only a small portion of the host of evidence used by the prosecution to support its claim of first-degree murder. Aside from the evidence that Wemark hid the knife in the basement following the stabbing, there was evidence Wemark changed his clothing following the stabbing and washed Melissa's blood from the clothing he was wearing at the time of the stabbing. There was also evidence Wemark wiped blood from the floor and moved Melissa's body into a bedroom. Wemark never summoned help from neighbors or police, but fled the house. There was further evidence that the knife wounds on his body were largely superficial and self-inflicted, and done only as an after thought to enable him to claim self-defense. There was also evidence Wemark had expressed an intent to kill Melissa on more than one occasion, and was very upset and angry over the estrangement of their marriage. Some of the fifteen stab wounds in Melissa's body were in her back. Considering all the evidence, the disclosure of the knife did not affect the outcome of the proceedings. Additionally, there was no claim that any other statement or information given to Dr. Taylor by Wemark was used by the State at trial. There was no prejudice.

602 N.W.2d at 817-18.

As noted previously, Wemark claims in this action that the Iowa Supreme Court's decision was in error. This is the issue before the court.

III. LEGAL ANALYSIS

A. Standard of Review

Federal courts' review of state prisoners' *habeas* petitions was examined in detail in the recent United States Supreme Court decision in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The *Williams* analysis focuses on the requirements of the federal *habeas* statute, 28 U.S.C. § 2254, in light of amendments enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The amendment "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." 529 U.S. at 399, 120 S. Ct. at 1516. For a state prisoner "to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1) . . . [which] modifies the role of federal habeas courts in reviewing petitions filed by state prisoners." 529 U.S. at 403, 120 S. Ct. at 1518. Specifically, the AEDPA limited the source of legal doctrine upon which federal courts may rely in considering a state prisoner's *habeas* petition to "clearly established law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 381, 399, 120 S. Ct. at 1506-07, 1516.

Prior to the AEDPA's enactment, federal courts could "rely on their own jurisprudence in addition to that of the Supreme Court." *Williams*, 529 U.S. at 381, 120 S. Ct. at 1507. The Court explained that subsequent to the AEDPA:

Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Williams, 529 U.S. at 404-05, 120 S. Ct. at 1519 (quoting 28 U.S.C. § 2254(d)(1)).

Under the first category, a state-court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.*, 529 U.S. at 405, 120 S. Ct. at 1519. The Court explained:

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

Id., 529 U.S. at 412-13, 120 S. Ct. at 1523. Further, "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Court's] decisions as of the time of the relevant state-court decision." *Id.*, 529 U.S. at 412, 120 S. Ct. at 1523.

The second category, involving an "unreasonable application" of Supreme Court clearly-established precedent, can arise in one of two ways. As the Court explained:

First, a state-court decision involves an unreasonable application of this Court's precedent if the state

court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id., 529 U.S. at 407, 120 S. Ct. at 1520 (citing *Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998)). Thus, where a state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," that decision "certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established federal law.'" *Id*, 529 U.S. at 407-08, 120 S. Ct. at 1520. Notably,

Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id., 529 U.S. at 411, 1250 S. Ct. at 1522.

If the state court decision was not contrary to clearly established Federal law, as determined by the Supreme Court of the United States, and if it did not involve an unreasonable application of that law, then the federal court must determine whether the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Applying these standards to the present case, with respect to Wemark's claim, the first issue is whether the Iowa Supreme Court reached a decision contrary to that reached by the United States Supreme Court on a question of law. The next issue is whether the Iowa court correctly identified the applicable principles of federal law as interpreted by the Supreme Court, but then unreasonably applied that law to the facts. The final issue is whether the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

B. Wemark's Claim

1. Relevant facts

Consideration of Wemark's claim requires consideration of facts in addition to those set forth by the Iowa courts and quoted above. Before discussing the applicable law, the court, in this section, will set forth relevant portions of the record dealing with disclosure of the knife, and its impact on the trial.[(2)]

As noted previously, the police did not find the knife in their search of Wemark's home; the knife was only disclosed when Wemark's attorneys urged him to meet with Dr. Taylor, and to disclose the knife's location to Dr. Taylor. As expected, Dr. Taylor then told the prosecutor of the knife's whereabouts, it

was retrieved by police, it was tested and found to contain traces of blood consistent with that of Melissa Wemark, and it was displayed to the jury at trial.

A few days prior to trial, Wemark's attorneys filed a motion to suppress the knife. Their written motion was supplemented by oral argument the morning of trial. Wemark asserted two grounds for suppression of the knife. First, Wemark's attorneys had sought to observe Wemark's interview by Dr. Taylor, arguing its primary purpose was interrogation to obtain facts useful to the State and, therefore, it was a custodial interrogation. The court denied that request. Therefore, Wemark argued his disclosure of the knife's whereabouts was made during a custodial interrogation without the benefit of counsel. Second, Wemark argued the court had erred in denying his prior motion to suppress evidence from the initial warrantless search of his home, and to suppress his statements at the time of his arrest. Wemark claimed that "[b]ut for the Court's rulings on prior motions to suppress [Wemark] would not have been required to notice defenses, including mental defense, and submit to the interrogation of Dr. Taylor which led to the discovery of the knife."[(3)]

The trial court denied the motion to suppress, finding Wemark had "failed to prove that the information provided to Dr. Taylor was anything other than voluntary." The court was "unable to conclude as a matter of law that the psychiatric examination of [Wemark] was an in-custody interrogation by a State agent." The court found its prior rulings on Wemark's suppression motions had been proper and, "[t]herefore, the seizure of the knife does not constitute fruit of a poisonous tree which must be suppressed in this case."[(4)]

The knife[(5)] first came up at trial during the defense's opening statement. Wemark's attorney explained the evidence would show that after Wemark killed his wife in self-defense, he cleaned up the blood and washed his clothing so as not to frighten the parties' young son, who was in the home at the time. Counsel said Wemark "cleaned the area up, moved his wife into another room and the knife sheath, the leather sheath that had been on the windowsill from which Ms. Wemark got the knife, was thrown into a cupboard or shelf above the basement stairs and the knife itself was thrown into the basement." (Trial Tr. p. 364) Counsel also told the jury the evidence would show law enforcement officers were not thorough in their investigation of the home, failing to fingerprint the knife sheath to see if Melissa Wemark had handled it, and learning "from the defense that if they just looked in the basement they'd find the knife. And they looked there and sure enough there it was." (Trial Tr. pp. 366-68)

The next reference to the knife occurred after opening statements but before the State began putting on its evidence. In a conference in chambers, one of Wemark's attorneys referred to the fact that he had provided the prosecutor with "proposed stipulations relating to the discovery of the knife," and the prosecution was going to review the proposed stipulations.[(6)] (*See* Trial Tr. p. 397)

The knife was mentioned briefly during the testimony of Dickinson County Sheriff's Deputy Thomas Paul Loebach. Deputy Loebach found Wemark in a house in Dickinson County (the "Shorey house"). During his description of the events, the prosecutor asked if Wemark had "describe[d] anything about the knife or where it was obtained," and the deputy responded, "I think he said his wife got it from a window and he had pulled it out of her back." (Trial Tr. p. 523) On cross-examination, the deputy agreed Wemark had told him "that his wife had grabbed a knife from the window and attacked him with that knife." (Trial Tr. p. 542) Wemark similarly told emergency medical personnel that "his wife had come after him with a knife and he attempted to take it away from her and that's how he got the cuts. He did at that point say that he pushed her and she fell on the knife." (Trial Tr. pp. 581-82; *see also id.* p. 583, 599)

After Wemark had been removed from the Shorey house by ambulance, the officers found, among other things, a pocketknife laying on the floor in the room where Wemark had been found. (Trial Tr. p. 527) The pocketknife was placed into a plastic bag along with some change, and taken to the Dickinson County Sheriff's office. (Trial Tr. p. 529)[(7)] A Winneshiek County deputy later took custody of the pocketknife and other evidence. (Trial Tr. p. 530) During cross-examination, Deputy Loebach testified as follows regarding the pocketknife and the knife:

Q (By Mr. Sandy, representing Wemark) Now, when you interviewed Mr. Wemark, did you ask him whether he stabbed his wife?

A (By Deputy Loebach) No, I did not.

Q Did you ask him what he did with the knife afterwards?

A No, I did not.

Q Now, Mr. Miller was talking about a pocketknife that was located at the scene, at the Shorey scene, the residence over in Dickinson County.

Am I correct that that knife was laying on the floor underneath all of the clothing?

A It was found there when we picked the clothing up, yes.

Q Now, these clothes were bloodied, the shirt and I believe the evidence will be seen by the jury, but there was a bloodied shirt as well as some bloodied pants and those were sitting there and the [pocket] knife was underneath those clothes, am I correct?

A That is correct.

(Trial Tr. pp. 549-50)

DCI Agent Alan Scholle was one of the officers who investigated the crime scene and gathered evidence. He testified at length regarding items seized at the Wemark residence, including officers'

discovery and seizure of the knife and knife sheath. On direct examination, Agent Scholle testified as follows:

Q (By Mr. Miller, representing the State) With regard to Exhibit "CO", tell us what that is?

A (By Agent Scholle) CO was what appeared to be a knife sheath, a leather knife sheath that was located by Special Agent Kemming in a cabinet above the basement steps in the kitchen right here.

Q Directing your attention to Exhibit 32, does that area appear in 32?

A Well, it would have been above the basement step area. It was a cupboard with a door at the very top.

Q It's actually out of the picture above the top of Exhibit 32?

A That is correct.

Q Thank you, sir.

What was done with that sheath?

A That was retained as evidence.

Q Where?

A It was kept at the Sheriff's Department in Decorah.

Q Were there any knives recovered from the kitchen, sir?

A Yes.

Q And can you tell me approximately how many and where they were recovered from?

A Couldn't give you a number necessarily. I know Agent Kemming took knives out of a drawer.

. . .

Q Did you observe knives while still in the residence yourself?

A Yes.

Q And where did you observe those knives?

A In the kitchen area. There was a tray of what appeared to be silverware on top of the kitchen counter.

Q Did you look at those knives, sir?

A I may have briefly looked at them, but the other agent was the one that examined those more closely.

Q Well, did you observe anything in the nature of apparent blood staining of any of those knives yourself, sir?

A No, I didn't.

Q And what was done with those kitchen knives?

A The kitchen knives that had sharp edges that were found in the kitchen were retained and taken along as evidence.

Q Where were they kept?

A They were kept at the Sheriff's Department in Decorah.

Q Did you try to recover any potential sharp edged weapons from the residence while you were processing that crime scene, sir?

A Weapons, referring to knives? Knives were what we took into evidence, yes.

Q Did you locate there on the 20th, any knives which had apparent blood staining on them, to your knowledge?

A No.

(Trial Tr. pp. 663-66)

A few minutes later, still during the direct examination of Agent Scholle, the following proceedings took place:

MR. MILLER: Your Honor, the State would pose the stipulation at this time as follows:

On June 10, 1993, agents of the State of Iowa again searched the Ridgeway, Iowa residence of Mr. Wemark and found the knife used in the altercation. This additional search was conducted after learning of the knife's location from Mr. Wemark on June 9, 1993.

MR. BLINK: So stipulated, Your Honor.

THE COURT: I will remind the jury that a stipulation can be considered as evidence.

Q (By Mr. Miller) Agent Scholle, did you in June of this year again enter the Wemark residence?

A (By Agent Scholle) Yes.

Q Now, you had completed your search there on January 21st in the afternoon, is that correct?

A That is correct.

Q And your next time in the residence was on June 10, is that correct?

A That is correct.

Q Who entered the residence besides yourself?

Q Special Agent John Lang, myself, Winneshiek County Deputy Cliff Carey and Winneshiek County Sheriff Floyd Ashbacher.

A And you had been provided with additional information to search an additional location in the house for this weapon?

A Yes.

Q Describe for the jury what you did in the house on June 10.

A Well, when we went in, got my camera equipment set up and we proceeded to go to the basement. I had placed rubber gloves on and we proceeded - or I proceeded to look under the basement steps for a knife.

Q Agent Scholle, you mentioned putting on gloves. Were similar precautions taken on January 20th and 21st of 1993?

A Yes, I wore rubber gloves and also had covering over my shoes.

Q Did you succeed in locating a knife anywhere in the basement?

A Yes.

Q Describe that for the jury.

A There was a massive pile of various auto parts and other junk underneath the basement stairs. And after searching for a period of time I located a knife in what I would describe as kind of a pan that you would have paint in to roll paint in, it was laying in that pan underneath a bunch of items underneath the stairs.

Q And is that where you were directed at that time to look, under the stairway that is?

A Yes.

Q Handing you what is marked as State's Exhibit 52, I'll ask if you recognize the subject of that photograph?

A Yes, I do.

Q What is it?

A This is a photograph of the various auto parts and other items accumulated underneath the basement steps at the Wemark residence.

Q Now, Agent Scholle, you agents had been in the house on the 20th and 21st of January?

A Yes.

Q Throughout the house, including the basement?

A Yes.

Q That knife was not located until you were directed specifically under those steps in June of this year?

A That is correct.

Q Would you please - please show the jury State's Exhibit 52 and tell then what that shows.

MR. MILLER: First I'll offer State's Exhibit 52 into evidence.

MR. BLINK: No objection

THE COURT: Received.

THE WITNESS: This is a photograph looking at the basement steps. You come down the steps here. This is the top. This is the items, auto parts and other items I referred to underneath the steps.

Q (By Mr. Miller) Can you see the knife in that photograph, sir?

A No, I cannot.

Q But does that photograph show that area as it appeared before anything was removed?

A Yes, it does.

Q Was it necessary to remove any of that debris before you were able to discover the knife?

A Yes.

Q Handing you what has been marked as State's Exhibit 53, I'll ask if you can describe that for us.

A After we began removing various bulky items . . .

Q Please don't display it to the jury, simply tell us what it shows.

A State's Exhibit 53 is a photograph, closer-up photograph of the knife as it was discovered underneath

the basement steps.

Q Was some of that junk under there removed prior to that photograph being taken?

A Yes.

Q That knife wasn't visible without removing some of those things?

A No, it was not.

Q So this photograph was taken after some of those parts had been removed from underneath the stairway?

A That is correct.

MR. MILLER: State offers Exhibit 53 into evidence.

MR. BLINK: No objection.

THE COURT: Received.

Q (By Mr. Miller) Please display to the jury and point out to them what they see in that picture.

A Okay, the knife is right here.

Q Referring again to State's Exhibit 52, if you will pick that up will you show the jury where in Exhibit 52, even though they can't see the knife, approximately where in that photograph the knife was buried?

A Approximately it was over on this and underneath the steps, I think behind this box area here.

Q Can you tell us approximately how much of those parts had to be removed before you discovered the knife?

A A number of items had to be moved. Not a significant amount, but maybe six to 12 items were pulled off the pile.

(Trial Tr. pp. 669-74)

Agent Scholle testified the knife sheath initially was not sent to the DCI crime lab. Although the knife sheath was seized on January 21, 1993, it was not taken to the lab until June 11, 1993, after recovery of the knife. (Trial Tr. p. 677) Originally, the knife sheath was "taken into custody by Deputy Cliff Carey of the Winneshiek County Sheriff's Department." (Trial Tr. p. 678) Other items taken into custody but not transmitted to the crime lab included, among other things, "[t]wo knives that were found in wooden boxes on bookshelves from the living room"; "[a] box containing numerous knives from the kitchen counter drawer"; "[a] knife and sheath found in the top dresser drawer in the laundry room"; and "[a] knife found in the second dresser drawer in the laundry room in a sheath." (Trial Tr. pp. 678-79) Agent Scholle testified no apparent blood staining was observable on the knives that were taken to the Sheriff's office but not transmitted to the crime lab. (Trial Tr. p. 679)

On cross-examination by Wemark's attorney, Agent Scholle testified as follows:

Q (By Mr. Blink, representing Wemark) Who searched the basement [on January 20 and 21, 1993]?

A I know I did and I believe Deputy Carey also went down.

Q Okay. And was that on the 20th or the 21st of January?

A It would have been on the 20th, the first day.

Q Okay. Did you move anything around?

A No.

Q You looked down there and you said bunch of car parts, let's go back upstairs?

A I walked around and saw no evidence of blood in the basement and saw no other items of evidentiary value down there so returned upstairs.

Q The point is, you didn't search down there for the knife, did you?

A No.

Q Is that because it was dirty?

A Well, there was no reason to believe that it was down there at that point.

Q And you felt if a knife wasn't put somewhere in the house where you wouldn't expect to find it, it would be maybe on the kitchen counter or something?

MR. MILLER: Object, argumentative.

THE COURT: Sustained.

Q (By Mr. Blink) Exhibit 32 is the only photograph that was taken when you were in there for the two days in January of any area close to the basement?

A That is correct.

Q We don't even see in that photograph where the knife sheath was found?

A Not in this particular photo, no.

Q Was there one where we saw the knife sheath?

A There was a photo of the cupboard area that it was found inside of, yes.

Q In fact you didn't take a picture of everything before it was removed from where it was found, did you?

A No. There were some paper items in a dresser and knives in a dresser, et cetera, that we did not photograph inside the dresser, that is correct.

(Trial Tr. pp. 696-98)

Q Now, you did not take the knife sheath found in the area going down to the basement, to the laboratory in January, did you?

A That's correct.

Q And you didn't make any attempt to check that for fingerprints, did you?

A Not until a later date.

Q Well, you didn't?

A That's correct.

Q And you didn't direct the Sheriff's office or suggest to the Sheriff's office that they take it down to Des Moines for examination, did you?

A No, I did not.

(Trial Tr. p. 702)

On redirect examination by the State, Agent Scholle testified further regarding his investigation of the crime scene, including the following:

Q (By Mr. Miller, representing the State) Tell me about this sheath that was found in the cupboard.

You indicated there's a photograph that shows that cupboard?

A Yes.

Q Is that one that we have looked at this morning?

A I'm not sure if it would show that or not. It would be one of the kitchen pictures.

Q I'll hand you what has been received as State's Exhibit 26 and ask if it appears in that photograph?

A Yes, it does.

Q Would you please point to it and I guess you can do it from there, if you will stand up or at least show the jury where that is?

A It's this cupboard right here.

Q Perhaps it would be better if you would just briefly step to the end so everybody can see it better.

A This is the basement stairs entryway right where this broom is. It's this cupboard with the handle up above the stairs.

Q Can you explain to us why the sheath was not taken to the laboratory in January of 1993?

A Well, initially Agent Kemming found it in the cupboard and I may have looked at it briefly. It was placed in the sack and retained at the Sheriff's Department. It wasn't sent because at that time we hadn't found a murder weapon and there was no reason to believe that it was connected to the crime.

. . .

Q You went to the basement on the 20th of January?

A Yes, I did.

Q Did you at that time find any knives in the basement?

A No.

Q Did you walk around in the basement?

A Yes, I did.

Q At the bottom of the stairs?

A Yes.

Q You didn't find any knife that appeared to have been thrown into the basement, did you?

A No.

(Trial Tr. pp. 706-08)

The next witness who testified about any knives was Winneshiek County Deputy Sheriff Cliff Carey. Deputy Carey said he retrieved certain items of evidence from the Dickinson County Sheriff's Department, including a three-bladed pocketknife. (Trial Tr. pp. 718-19) He said the pocketknife remained locked up in his office from January 22 to February 2, 1993, and then he took the pocketknife and other evidence to the DCI lab in Des Moines. (Trial Tr. p. 719) Deputy Carey stated he was with Agent Scholle at the time the knife was found under the stairs, and he testified State's Exhibit 52 reflected the location where the knife was found. (Trial Tr. p. 725) Deputy Carey took custody of the knife and delivered it to the DCI lab along with the leather knife sheath, which had been in his custody since the January search. (Trial Tr. p. 726; *see* Trial Tr. pp. 732-34)

John Kilgore, a criminalist at the DCI lab, testified about his examination of the knife sheath (*see* Trial Tr. pp. 758-63), and of the knife found in Wemark's basement (*see* Trial Tr. pp. 764-66) He described various means he used to determine if there were any latent fingerprints on the knife sheath, and testified he found no patent or latent prints on the knife sheath. (Trial Tr. pp. 760-61) He also testified about his examination of the knife, which he referred to as a "large folding knife." (Trial Tr. p. 763) He noted one patent print was visible "on the brass cap at the non-hinge end of the knife," and no latent prints were found. The officer stated the visible patent print did not match either Wemark or the victim. (Trial Tr. pp. 763-64)

Another criminalist with the DCI lab, Marie Sides, testified regarding her examination of the knife sheath and the knife for blood evidence. On direct examination, she testified as follows:

Q (By Mr. Miller, representing the State) Mrs. Sides, you have already described an Exhibit CO which is a sheath. And it's here as State's Exhibit 90. Do you recognize that?

A Yes, I do.

Q And is that the sheath that you have described as Exhibit CO?

A Yes, it is.

Q And I believe you have already briefly described, but would you again just so you're clear and what your findings were with Exhibit CO?

A CO is a knife sheath. I found two stained areas that I tested for blood grouping results. I did not mark them on the sheath because the sheath needed to be done for fingerprint examination. So I only consumed what sample I needed and didn't make any additional marks.

One stain which was this stain is consistent with the known blood of Robert Wemark and the stain on this side is consistent with the known blood of Melissa Wemark.

Q You also have before you a plastic bag with the State's Exhibit 91 noted on that. Do you recognize that?

A Yes, I do.

Q What is that?

A That is the knife that I examined in conjunction with this case.

Q Did you arrive at any conclusions as to Exhibit 91, that knife?

A There was human blood on the knife and the blood was consistent with the known blood of Melissa

Wemark.

Q Would you describe the appearance of the human blood on there and where you found it?

A May I take it out?

Q Well, we understand from Mr. Kilgore that it's not safe to handle that.

A Okay. The areas that I tested for blood included the blade of the knife. And where I found the human blood was at the base of the blade where it attaches to the handle. So when I pulled the knife out I could see staining around that area. So that was the area where I detected the human blood that was consistent with Melissa Wemark's blood.

Q Could you describe the appearance of the blood as you found it?

A The blood tends to have a reddish brown color. I also noted that it was a little darker, and when I went to collect my samples there was a black substance that also come off with the sample, so it appeared that maybe there was some grease associated with that hinge area of the knife.

Q Did you make any observations as to whether the blood appeared to be either dropped, smeared or wiped in any fashion?

A The knife blade appeared to be wiped. You could see like little spots left on a glass, like water spotting, you could see areas that looked like they had been smeared. The blood at the base of the knife was not droplet in form, it was more smear in form.

Q Do you use - take any precautions when you're doing work in handling exhibits as far as placing any of your own fingerprints?

A If I know that the samples are going to be processed for latent fingerprints we wear a pair of cotton gloves to avoid leaving fingerprints. And we also handle the items in areas that are less likely to contain suitable latent prints.

So for example, there is a very rough surface on the edge or the center portion of the knife, so I would try to handle that area and then other areas that I must touch in order to open the knife, to look for blood in order to do my tests. I try to handle as little as possible.

Q Did you note how that knife operated as far as opening and closing when you were examining it?

A Yes, I did have to open the knife. There is a lock release button on the back of the handle. When the blade is in the open position it has to be pressed in order to release it. I don't recall whether it has to be pressed in order to open it, I don't believe so, but I don't recall.

(Trial Tr. pp. 799-802)

Sides also testified regarding her examination and testing of the pocketknife, noting she found blood consistent with Wemark's blood on "the larger of the three blades, the middle sized blade and . . . an area centrally located on the handle of the knife[.]" (Trial Tr. p. 815; *see id.* pp. 815-17)

Dr. Tom Bennett, the Iowa State Medical Examiner, testified about his autopsy of Melissa Wemark. During his testimony, Dr. Bennett opined that the knife found in Wemark's home could have been used to inflict the wounds present on Melissa Wemark's body:

Q (By Mr. Miller, appearing for the State) Dr. Bennett, I'm showing you State's Exhibit 91 which is a Buck knife. It's encased in plastic and one can't open it fully, but with the blade open partially for the purposes of seeing the dimensions, is Exhibit 91, that knife, is that a knife capable of inflicting the injuries you found on Melissa Wemark?

A (By Dr. Bennett) Based upon her body characteristics she was described - I described her as mildly obese. I estimated she weighed 220 pounds. She had some fat which is compressible. Even though the blade appears to be three and a half inches in length or so, it's possible on a fleshy individual to produce a stab wound much deeper than the blade is long by virtue of the fact that you can compress the skin surface, it's just that the flesh can be compressed.

In summary, yes, this knife could have produced the wounds that were found on Melissa Wemark's body.

Q Even to the depth of six inches as you have indicated?

A Yes, sir.

Q That would have required enough force to compress her body?

A Yes, sir.

(Trial Tr. pp. 904-05) The doctor testified the same knife also could have been used to inflict the wounds found on Wemark. (Trial Tr. p. 915)

The prosecutor mentioned the knife several times during closing argument. First, in arguing Wemark acted with malice, the prosecutor stated:

[MR. MILLER:] Finally, ladies and gentlemen, we have the act itself and the instrument used to commit that act, State's Exhibit 91. It's a very deadly weapon. You have heard the Court instruct you on the use of a dangerous weapon. In the instructions the Court includes a definition of a dangerous weapon as to what it is, but I think you folks understand that when something like this is opened up and used repeatedly over and over and over again to bury that blade in the body of a living, breathing human being, that it's a dangerous weapon and it's a dangerous weapon used in an act of malice.

The Court has instructed you and you will find it in Instruction 26, "You may, but are not required, to infer malice aforethought from the use of a dangerous weapon, without justification." And I think you folks will find that that instruction just makes good common sense.

(Trial Tr. pp. 1,020-21) He mentioned the knife again in his argument that Wemark did not act in self-defense:

[MR. MILLER:] Ladies and gentlemen, State's Exhibit 91 is the knife that was used to inflict the wounds upon Melissa Wemark. And State's Exhibit 89 is the pocketknife found with the Defendant's clothing at the Shorey farm in Dickinson County. There is a substantial difference between these weapons, ladies and gentlemen, several substantial differences. Not only their deadly appearance and where they were found; this one at the Wemark residence, this one with the Defendant where he fled 24 hours later. Exhibit 91, the murder weapon in this case, ladies and gentlemen, was examined at the laboratory and found to have blood stains consistent with the known blood of Melissa Wemark. State's Exhibit 89 was examined at the laboratory and found to have blood and you can see that blood smeared on the blade of Robert Wemark's little pocketknife, stained with his own blood.

And just as there is such a vast difference between these two weapons, you will notice also the stark difference in the stab wounds suffered by these two people.

(Trial Tr. pp. 1,024-25)

The prosecutor specifically addressed the location where the knife was found, arguing:

[MR. MILLER:] Robert Wemark hid the weapon. He didn't toss it into the basement as we heard his act described a week ago. He hid it. He went down there and stashed it inside under that pile, hiding the weapon. Again, ladies and gentlemen, the act of a mind with guilty knowledge, that would have us here today say that he acted in self-defense.

(Trial Tr. p. 1,027)

Wemark's attorney also discussed the knife in closing argument. Counsel first reviewed the facts of law enforcement's search of the house, and their failure to search the basement. He noted they only "look[ed] in the kitchen drawers" for a knife. (Trial Tr. p. 1,050) "Finally the knife was recovered. The knife was recovered because the Defendant told them look, go look under that stuff underneath the stairs. You know, just down the stairs from where the sheath is. Sure enough, there it was, thrown in a pile of old car parts." (*Id.*) He pointed out the knife sheath was found to have traces of blood consistent with both Wemark and his wife, Melissa. (Trial Tr. pp. 1,049-50) Counsel also argued the State was negligent in its overall investigation of the case, including, among other things, its failure to obtain a DNA test to identify blood stains found on the knife. (Trial Tr. pp. 1,062-63)

In rebuttal, the prosecutor indirectly referred to the knife again when he argued, "The very fact of destroying, altering, concealing evidence by the Defendant in this case is the act of a man who wants that evidence to show something other than the truth, something other than his crime for what it was." (Trial Tr. p. 1,081) More directly, the prosecutor argued:

[MR. MILLER:] We have here an experienced police officer, spending 24 hours taking extraordinary measures to destroy evidence, to alter evidence, to fabricate evidence and to conceal evidence, hiding that knife under that pile of auto parts in the basement of his house. And a man who knows what evidence is, trained and experienced in evidence, playing games with evidence for 24 hours before he is apprehended and here in this courtroom asking to receive the benefit of his own destruction and concealment of evidence, asking you to say if he was good enough at hiding and destroying evidence that should be held against the State of Iowa, that turns it on his head, that doesn't make any sense. The fact that he was successful in destroying, concealing and fabricating the evidence should be held against the man who fabricated, concealed and destroyed that evidence, because he did so with a guilty mind.

The knife sheath. The knife sheath was discovered in a cupboard above the doorway to the basement. Melissa Wemark was found in a bedroom off the entryway to the house. There was no immediate reason for the officers to suspect involvement of that sheath until after the knife was found; the knife that matches the sheath.

(Trial Tr. pp. 1,083-84) He also pointed out the knife's blade had been wiped, stating:

[BY MR. MILLER:] Blood on the knife. Ladies and gentlemen, the blood on the weapon used to take the life of Melissa Wemark came back ABO type AB which is consistent with and tells us for sure that it has her blood on it. She can't say for sure it doesn't also mask his blood, but she was able to find Melissa Wemark's blood on it and it was very difficult to get any positive results because the blade was wiped. Here again, ladies and gentlemen, a destruction of evidence. But destroyed by whom? The man who wiped that blade, ladies and gentlemen, sits there, Robert Wemark. Yet another example of his efforts to destroy and alter the evidence in this case.

(Trial Tr. p. 1,093)

After Wemark was found guilty of first-degree murder, and his direct appeal was denied, Wemark filed a timely application for post-conviction relief. An evidentiary hearing on the petition was held October 8, 1997, before Winneshiek County Judge Margaret L. Lingreen. In his PCR action, Wemark argued, among other things, that his trial counsel's ineffective assistance led to his first-degree murder conviction. Relevant portions of the PCR hearing transcript are as follows:

[BY MR. PUTNAM, representing Wemark] Finally, Your Honor, is the issue of the knife, the knife that Mr. Miller waved in front of the jury in his closing multiple times talking about that knife. In fact, that exhibit is here, Your Honor, from the trial. I asked the clerk to bring it up.

The Court of Appeals' ruling discussed the knife, but they didn't have the knife that was used. They didn't have the references in the closing argument to the knife and, also, the fact, as Mr. Miller alleged, of premeditation, the willful destruction of evidence and hiding of evidence, because it was hidden under - according to Mr. Miller - the stairway. The evidence will show, Your Honor, that, in fact, this knife wasn't found until Mr. Wemark was directed by his counsel to tell the State psychiatrist basically where the knife was.

It's at that point that the knife came out and Judge Beeghly overruled a Motion to Suppress. There was a case clearly on point that would have held the knife should not have been admitted. The Court of Appeals referred to that case.

The - Beyond that, we also had reference from Mr. Miller about wiping evidence away because there was testimony that this knife that's now been examined by the State had Melissa's blood type on it and another blood type that was unknown or they really couldn't tell because somebody had wiped the evidence away; and he pointed to Mr. Wemark. I believe any one of these areas alone would be cause for post-conviction relief, Your Honor.

I - I believe when the Court reviews the multiple problems with this case, the multiple - And I might add, Your Honor, one of the - the situations with the knife, and the Court will review the - the memorandum in the file of Mr. Blink, he recognized he had an ethical problem because he was aware of where this knife was located and it allegedly was the murder weapon and he didn't know how to disclose it.

He didn't disclose this ethical problem to his client. He sent his client down to give testimony to the State's doctor, telling the State's doctor where the knife was so the State could find the knife that way.

You'll see his memorandum wherein he discusses that. But he never discussed that with his client, never told him of this ethical problem.

The Court will also have an opportunity to review the transcript and the testimony of Doctor Anderson which was taken on June 2nd, nine - or seven days before Mr. Wemark's examination. In that transcript, the Court will see that at that point there was no longer a defense of diminished responsibility.

The defendant's witness said in that transcript at - following questions of Mr. Miller that Robert Wemark could form intent, could premeditate. Basically, diminished responsibility was not a defense, as stated by their own witness. Nonetheless, they went ahead and had Mr. Wemark offer up the knife, which the State used repeatedly in its case.

(PCR Tr. pp. 11-13)

The State relied on the decision by the Iowa Court of Appeals in arguing the knife was "not an issue" in the PCR action. "The Iowa Court of Appeals said the location of the knife . . . and subsequent production of the knife wasn't an issue in this trial because everybody knew it was a stabbing death." (PCR Tr. p. 15)

Winneshiek County Deputy Sheriff Cliff Carey testified at the PCR hearing, confirming the evidence elicited at trial that the knife was not found in officers' first search of Wemark's house. The knife was located in June of 1993, a couple of weeks prior to the trial. (PCR Tr. p. 17)

Wemark's daughter, Kathryn Sue Wemark Lechtenberg ("Kathryn"), testified at the PCR hearing regarding her involvement in trial preparation and throughout the trial. Kathryn kept extensive notes beginning a couple of days after Melissa Wemark's body was found and continuing through the trial. She was present during some of the discussions between Wemark and his attorneys. Although Kathryn testified about her concerns relative to Wemark's being examined by Dr. Taylor, her testimony did not touch on Wemark's disclosure of the knife. She did, however, testify about the State's use of the knife during closing argument:

Q [By Mr. Putnam, representing Wemark] Were you present at the trial other than as a witness - Let me rephrase that.

After you testified, were you allowed to stay for the trial?

A [By Kathryn] Yes.

Q Did you see the closing statements?

A Yes.

Q Have you seen this item before?

A Yes.

A And what is it?

A That was the knife that Mr. Miller had used saying that that was the murder weapon; but at that time, I believe the blade was open. It wasn't closed like that.

Q So the - the blade in this bag that's State's Exhibit 91 was open?

A Ah-huh, yes.

Q Was it still - was it still in the bag?

A I don't believe it was in the bag. A blade was open on a knife, but I remember him using it like a - like a knife would be used.

Q Was the knife the focal point of Mr. Miller's closing?

A Yes.

Q Was he theatrical with it?

A Yes, very much so.

Q And did he - This, obviously, was down in West Union and the jury box is a little bit different; -

A Right.

Q - but did he parade the knife in front of the jury?

A Yes. At one point, he even said that there was 15 stab wounds and this is how many times 15 - you know, the knife goes in 15 times and used the knife in his hands as you would stab 15 times.

Q So he made knife gestures with his hand 15 times during his testimony [sic]?

A Yes.

Q And you haven't read the transcript of his testimony [sic]; have you?

A No.

Q Do you recall if he mentioned anything about where the knife was found in his closing or drew attention to that?

A I remember it coming up that the knife was found in the basement of the house that this had all happened in and that dad had hid the knife; and just because I knew what the basement of the house looked like, to me, I thought I don't know how he could come up with, you know, necessarily hiding the knife because it was a mess.

The basement was full of auto parts. It looked more like a garage than - you know, like a normal garage than a regular basement with auto parts.

Q But you recall Mr. Miller making reference to Bob hiding the knife?

A Yes.

(PCR Tr. pp. 72-74)

Wemark testified in his own behalf at the PCR hearing. On the issue of disclosure of the knife, he testified as follows:

Q [By Mr. Putnam, representing Wemark] Did you tell [your attorneys] how the knife came to be under the stairway?

A Yes.

Q How was it that it ended up there?

A Oh, when this happened, all you could see was black and white, and my ears were ringing like crazy; and I remember picking up the sheath and I threw it up above the cupboard going down the basement, and I picked up the knife so my boy - He was still sleeping yet, and I didn't want him to see it.

I took it down in the basement, and I tossed it underneath the stairway; and I had a bunch of automotive parts under there. It bounced back out again, I remember that, and then I tossed it in there again; and it didn't come back out.

Q And is that what you told Mr. Blink and Mr. Sandy?

A Yes.

Q And is that also what you told Doctor Anderson and Doctor Taylor?

A Yes.

Q At the time of the trial, did anyone testify that the knife was thrown under there versus deliberately hidden?

A Mr. Blink did, I - I believe. He mentioned it at my trial, that it was -

Q But did anybody - Was anybody called as a witness -

A No.

Q - to testify how, in fact, the knife got under the stairway?

A No.

Q Do you recall the officers who found the knife being called as witnesses to testify that it was hidden under a bunch of items or - Do you remember that, Bob?

A They - they brought - Deputy Carey is the one that testified, I believe.

Q But -

A That was four and a half years ago. I can't remember for sure.

Q Was the - Did you ever ask Mr. Blink or Mr. Sandy if you could testify and set the record straight as to what happened with the knife?

A Yes.

Q And what did they say?

A They said, "You're better off - off not to testify."

(PCR Tr. pp. 125-27) On cross-examination, Wemark reiterated that he had thrown the knife "into some auto parts down in the basement[.]" (PCR Tr. p. 129)

On redirect examination, Wemark testified further as follows:

Q (By Mr. Putnam) Before you went to meet Doctor Anderson or Doctor Taylor, did Rob Blink or John Sandy tell you that they had an ethical problem because they knew where the knife was?

A I don't - don't remember.

Q Did they ever tell you - You've testified, and I believe there will be testimony from Mr. Sandy, that both Blink and Sandy told you to tell the truth; and you've already testified to that.

Correct?

A Yes.

Q Did they tell you that they could have instructed you not to tell the doctor about the knife?

A No. They just told me to tell the whole truth.

Q Did they tell you that they - that they could have told you and you could have told the doctor, "No, Doctor, I'm not going to tell you about the knife?"

Did anybody ever mention that to you?

A No.

Q And, Mr. Wemark, is it your understanding that if you had not told Doctor Taylor about the knife, the big knife, Exhibit 91, that the State never would have found it and Mr. Miller wouldn't have stood at the jury box raising it up and down over and over?

A Yes.

Q It hadn't been found until you told Taylor where it was at?

A Yes.

Q And your attorneys did not tell you that they had an ethical problem with their knowledge of the knife?

A No.

Q Did they tell you that after Mr. Anderson's deposition, the first doctor, that you had no chance of a defense of diminished responsibility?

MR. VANDERMAATEN: I'm going to object.

A No.

MR. VANDERMAATEN: Your Honor, the question's leading.

THE COURT: Overruled. I'm going to allow it to stay in. The answer is in.

Q Did they tell you that Doctor Anderson testified in his deposition that you didn't suffer any mental disability at the time of the incident?

A I don't remember them ever saying anything.

Q Did they tell you that in light of that testimony a week before Taylor's testimony that it made no sense, no legal meaning, nothing could benefit you, by going ahead and giving a statement to Mr. Taylor?

MR. VANDERMAATEN: I'd object.

A No.

MR. VANDERMAATEN: Again, Your Honor. The question is leading.

THE COURT: Sustained.

MR. VANDERMAATEN: Also assumes facts not in the record.

THE COURT: Sustained on both grounds.

Q Did they tell you - Prior to Doctor Taylor's deposition and - and his examination of you, did they tell you whether they thought that would be a good thing or a bad thing or was worthwhile or what did they tell you about Taylor's deposition?

A Well, -

Q Excuse me, Taylor's examination.

A Well, they told me to go down there and tell him the whole truth; and that's all they told me, to tell him the whole story, and I never got to see what he wrote. He wrote it in shorthand.

(PCR Tr. pp. 1160-62)

Q You have now seen a document entitled a memorandum that was in Mr. Blink's file regarding an ethical issue regarding the knife?

A Yes.

Q Did I provide that to you?

A Yes.

Q And that came after I went to Des Moines and retrieved it from Mr. Blink's file?

A Yes.

Q Had you ever seen that document or ever been advised that there was any ethical concerns that your attorneys had regarding your case?

A No.

(PCR Tr. p. 170)

Wemark called Karl Knudson, one of the prosecutors in his case, as a witness at the PCR hearing, and tried to elicit testimony that the knife was a key piece of evidence in the State's efforts to show the stabbing was premeditated. Wemark was unsuccessful in eliciting any admissions from Knudson, who repeatedly stated the record would speak for itself. (*See* PCR Tr. pp. 173-79) Knudson admitted Dr. Anderson's pretrial deposition had gone "well for the State," which would "certainly weaken [Wemark's] defense [of diminished capacity[,]" (PCR Tr. p. 183) but he denied any assumption that the State's expert would reach the same conclusions as had Dr. Anderson. (*Id.*)

At the PCR hearing, the State called one of Wemark's trial attorneys, Robert James Blink (now an Iowa District Court Judge), who testified at length regarding the decision to have Wemark disclose the knife's whereabouts to Dr. Taylor. Blink's testimony, in relevant part, was as follows:

Q (By Mr. Vandermaaten, representing the State) You filed a notice of diminished responsibility defense in this case; is that correct?

A (By Blink) Yes.

Q And a Doctor Anderson examined Mr. Wemark?

A Yes.

Q Following that, did the State request an examination by their own expert?

A Yes.

Q And who was that expert?

A Doctor Michael Taylor.

Q Could you describe - Well, let me back up. Mr. Wemark is claiming that it was inappropriate to permit him to be examined without your presence at the examination and that you had told him to be honest, apparently, with the psychiatrist, knowing there was a possibility that the knife that he had used to stab his wife would be disclosed, its whereabouts?

A Yes.

Q Could you describe for the Court, please, how - how you approached this particular issue with Mr. Wemark and how you discussed how - how the knife would come into play here?

A Yes. There are a lot of facets to the question you've asked, and I'll try to work through them in a logical - in a logical way. Mr. Wemark disclosed to us the whereabouts of the knife, I believe, on either the 1st or the 2nd of June, immediately preceding the trial. I believe it was the 1st of June - I believe it was in a meeting that occurred here in Winneshiek County - and it placed Mr. Sandy and I in a very difficult ethical position, which we explained to Mr. Wemark.

Q What was the ethical dilemma you were facing?

A Well, the ethical dilemma was this was now the second time that Mr. Wemark had disclosed to us evidence, information about evidence, concerning the crime. The first was the rifle, and I think that disclosure occurred in May. This was the second time that he had made a disclosure about a physical piece of evidence.

And he had been - he had been told in - in May when he disclosed the whereabouts of the rifle that the defense lawyers were now cognizant of evidence and that we could not hide evidence, we could not destroy evidence, and that we had an ethical obligation to disclose the evidence and that that had to be done in a way that would minimize any risk to Mr. Wemark's legal position and at the same time maintain the integrity of the legal system and the ethics of the lawyers.

That was thoroughly and completely first discussed with Mr. Wemark at the time that he told us that the gun was in the house in which he was found, rather than having been thrown out of the window of the vehicle, as he had told police. His consent was obtained and - to disclose the information about the .22 rifle, and it - and ultimately that was - that was disclosed.

So by the time of early June when he disclosed to us where the knife was, he was - he was already aware of the ethical problems this generated for the lawyers as that related -

MR. PUTNAM: Your Honor, I'm - I'm going to object and ask that we go - proceed with question and answer, rather than a long recitation.

THE COURT: Sustained.

Please ask a new question.

Q How did you deal with the ethical problem that was raised here?

A Now, you're talking about the knife?

Q The knife.

A Okay. We went through the same process that we went through in discussing the ethical dilemmas that that created with the gun.

Q And what options did you see as being available to resolve that ethical problem?

A All right. There were - Well, there were several options. Option number one was to wait and see if law enforcement would ever go back and search the residence again and find it. Based on the quality of the work they'd done in this case, I thought that was unlikely.

Option number two was to allow that information to come out, if it did come out, in the discussion between Mr. Wemark and Doctor Taylor. If that - if that occurred, there were two benefits.

First, it would have been the first time that Robert Wemark made a significantly truthful statement to law enforcement throughout these whole proceedings. Because every other material statement he had made to them had been, I believe, patently false and untrue.

If he told Doctor Taylor truthfully what and where the knife had been - how and where the knife had been placed, that would have been one opportunity for us to say at trial, "You see. Mr. Wemark did tell the truth."

The third option for disclosure and maintaining our ethics would have been - and the intent was - for me to hire a lawyer to represent myself, direct that lawyer not to disclose his or her principal, and have that lawyer contact Mr. Miller and tell Mr. Miller there is a piece of evidence to be found under a pile of automobile parts in the basement of the Ridgeway residence. We never got to the - the third option because the second option occurred.

Q Again, were all three options discussed with Mr. Wemark?

A Yes.

Q What was his reaction to the discussion of the knife?

A When he first told us where the knife was, our response was somewhat demonstratively, oh, brother, or holy cow. It might have been a little stronger than that. In response to our reaction to having told us where the knife is, Mr. Wemark made a comment, - and I'm paraphrasing here - "Well, if it's a problem, I can have Jamie go out there and just get rid of it."

And we said, "No, Bob, we can't do that. Now that you've told us that this evidence exists, we cannot destroy the evidence."

Q When you realized that you had this ethical dilemma, how did you react to it?

A I was obviously concerned. This is the second time that we had faced it. Mr. Sandy had faced the gun issue first with Mr. Wemark because Mr. Wemark was staying in Dickinson County, I believe, at the time that he told Mr. Sandy about the rifle.

I was deeply concerned. I would have learned about it on the 1st or the 2nd of June - I believe it was the 1st - because Mr. Sandy and I went to the Ridgeway residence to actually see if the knife was there because, frankly, we - we couldn't rely on anything that Mr. Wemark told us as to whether it was true or not.

We observed the knife. We did not take the knife, and we then went to northwest Iowa to complete the depositions there. I would have returned to Des Moines probably on the 2nd or the 3rd, and on the 4th day of June I elected to contact people whom I respected and discuss the matter with them.

Q Who in particular did you contact?

A I contacted Chief Judge Arthur E. Gamble, who is chief judge of the Fifth Judicial District and a person that I respect. I contacted John Roehrick, a recognized criminal defense lawyer of long experience against whom I had tried a number of cases. I contacted Mr. William Kutmus, another recognized, experienced criminal defense lawyer; and I contacted Mr. Pat Hopkins, a former assistant attorney general, with whom I had worked and - and whose ethics I respected.

I discussed the matter with them in hypothetical terms without ever disclosing the name of Mr. Wemark so that I could confirm my opinion as to what had to be done. I also had research - I also had research done by a law clerk of ours concerning the Sixth Amendment - I believe it was Sixth Amendment - issues, if I remember correctly; but I - my memory - My recollection isn't particularly certain on that. That may have been on a - that may have been on a different - different issues.

Q Based on - on your contacts and - and your reflection on the facts that were presented to you, you chose or - or narrowed the field down to three options that you had with respect to the knife?

A Yes.

Q How did you ultimately settle on the second option; that is, disclosure of the knife or potential disclosure of the knife through Doctor Taylor's interview?

A Well, because - because Mr. Wemark was going to be talking with Doctor Taylor anyway for - for a number of other reasons; and, as I mentioned before, it was an opportunity to put Mr. Wemark in a position where he said something truthful to law enforcement. That would have helped Mr. Wemark's defense, and it would have at the same time assisted the lawyers in complying with their ethical obligations.

Q Do you recall the date that Mr. Wemark was interviewed by Doctor Taylor?

A I believe it was the 9th of June, if memory serves me correctly.

Q You were not present for that interview?

A No, I was not present for that interview.

Q Did you make efforts to try to arrange to be present?

A Yes.

Q And what steps did you take to accomplish that?

A I personally spoke with Tom Miller and requested that I be present. If I couldn't be in the room, I requested that I be in an anteroom with a one-way mirror, merely so I could observe. In fact, I followed that up with a letter to Mr. Miller; and the letter stated, in pertinent part, please consider this letter to be a formal request for my presence.

I believe as a matter of law I did not have a right to be personally present, but I sought it anyway and it was turned down; and, ultimately, then we moved to suppress any statements made by Mr. Wemark to Doctor Taylor on an assertion that constitutional rights had been violated because we had not been permitted to be present.

Q Was Mr. Wemark aware that you were not going to be present at that interview?

A Yes.

Q How was he aware of that fact?

A We told him.

Q What else did you tell Mr. Wemark with respect to that interview?

A The most significant thing that we told him is that he had to tell the truth. This was one opportunity for him to finally tell the truth.

Q Did you discuss the fact that the knife would probably be brought up in the interview?

A We discussed the fact that if the question was asked he should give a truthful answer.

Q Up to that point in time, had you sat down with Mr. Wemark and said words to the effect that you wanted him to tell you everything that happened from early morning January 19, 1993, until they found him at Dickinson County?

A I don't believe so. That's not the approach that I took with criminal defendants.

Q What approach did you take with criminal defendants?

A Generally speaking, it was my experience that almost all persons accused of crimes that I represented would rarely, if ever, tell you the truth in the beginning and many would never tell you the truth even at the end.

The - So that you did not generate a problem of a client giving you lies that would cause difficulty by placing them on the stand, the approach was this: You would say to the defendant, "This is what the State says happened," or "This is what the State says they can prove. What do you say about that particular fact?" That approach was taken with Mr. Wemark repeatedly, consistently, as evidence was disclosed throughout the discovery process.

Q Mr. Wemark disclosed the whereabouts of the knife to Doctor Taylor?

A He did.

Q Did you ever consider telling Mr. Wemark to refuse to answer that question if Doctor Taylor asked him?

A No.

Q Why not?

A Because when the Fifth Amendment is waived, the Fifth Amendment is waived. There is no in between. There is no diluted right to remain silent. The right is either exercised or the right is waived; and it - it would have been inappropriate, I think, to counsel a client under those circumstances that you could say whatever you wanted but when you didn't - when you didn't want to talk about a particular fact you should just be quiet.

If he wanted to exercise his right to remain silent and he had told us that, we would have simply said he's - he's going to exercise his Fifth Amendment and he's not going to talk to Doctor Taylor at all.

Q Would that have effectively foreclosed the diminished responsibility defense for him?

A I believe it would have - it would have effectively foreclosed that defense. It would have effectively precluded the opportunity for Mr. Wemark to - to be truthful and - and give us that ammunition at trial, yes.

Q Doctor Anderson had evaluated Mr. Wemark prior to Doctor Taylor's examination; is that correct?

A Yes.

Q And, in fact, Doctor Anderson had been deposed approximately a week before that evaluation; is that right?

A On the 2nd of - 2nd of June.

Q You had filed a notice of diminished responsibility defense for Mr. Wemark?

A Correct.

Q And you were present at that deposition; is that right?

A I think it was a telephonic deposition; but we were in the law offices of Mr. Sandy, if I recall.

Q Do you recall Mr. - or Doctor Anderson testifying that he believed Mr. Wemark to be capable of deliberate premeditation and specific intent to kill?

A Yes.

Q And that, essentially, goes to the heart of the diminished responsibility defense; does it not?

A It does.

Q Why did you choose at that time to leave the defense of diminished responsibility open and proceed with the evaluation with Doctor Taylor?

A Well, that wasn't all that Doctor Anderson said. Oh, he also indicated, as I recall, that Mr. Wemark under the circumstances of the incident acted impulsively or words to that effect, and I'm paraphrasing here, but it left open the - the legal argument or at least some factual basis for an argument on irresistible impulse; and that remained on the table at least as a potential option, and we didn't want to close that - close that door.

Q Was there any other reason that you wanted to have him evaluated by Doctor Taylor?

A Yes. I had known Michael Taylor for probably more than a decade before this case was tried. I had employed him as an expert on a number of occasions as a prosecutor; and on a number of occasions Michael Taylor had come to me, having evaluated a criminal defendant, and either said, "Rob, I think this man is insane," or he came to me and said, "This man has a neurosis or a psychosis which would support a diminished responsibility defense."

The point I'm making is in my experience in working with Michael Taylor he was a reliable, objective expert for a prosecutor. There was a reasonable possibility that an expert of Doctor Taylor's credentials could talk with Bob Wemark and reach the conclusion that diminished responsibility existed.

Now, that may not have been a high percentage, but it was a potential; and we had nothing to lose at that point in light of what Doctor Anderson had said and in light of the fact that Mr. Wemark's prior statements had all been untruthful.

So there was, frankly, in - in a risk/benefit analysis, there was virtually no risk and there was the potential for benefit.

Q I want to go back to Doctor Anderson's deposition for just a moment. I'd ask you to review page 32 of that deposition beginning at approximately line seven.

A (The witness complied.) Yes.

Q Is that the portion of the deposition that you were referring to with respect to the uncontrollable impulse language?

A Yes, it is.

Q You testified that sending Mr. Wemark to Doctor Taylor left you with nothing to lose.

What about the disclosure of the knife, did you consider that to be a potential problem?

A No.

Q Why is that?

A Because the disclosure of the knife in this case was so insignificant in light of the weight of evidence against Mr. Wemark that it would be like a hummingbird landing on the Queen Mary; it might add some weight to the ship but it would be so insignificant it would not matter at all.

When you measure the disclosure of the knife compared to the other significant evidence in this case, his statement that she fell on the knife but was stabbed 15 times, the fact that she was stabbed seven times in the back, the fact that he left notes in - it was either - the automobile - I think it was in the automobile - about how he was considering - or the house, he was considering not only taking his own life but murdering his three-year-old son, the - the photographs of - of the - the wounds on the body which were so graphic, the disclosure of the knife simply had no weight.

Tom Miller could have argued that Mr. Wemark tried to hide the knife whether the knife had ever been disclosed or not.

Q So the fact that Mr. Miller was capable of arguing that he had concealed the knife under auto parts was no different than Mr. Miller arguing that he had done such a good job of concealing the knife that law enforcement couldn't find it?

MR. PUTNAM: Objection; leading.

THE COURT: Sustained.

Q There were various arguments available to Mr. Miller regarding the concealment of the knife?

A The - the presence of the knife at trial in - in view of all the other evidence in the case was - was minimal; and whatever potential risk there was for Mr. Wemark's legal defense, the benefit of - of having an opportunity to get a truthful statement of his in front of the jury outweighed it.

Q After Mr. Wemark disclosed the location of the knife to Doctor Taylor, after the knife was located, you filed a Motion to Suppress?

A Yes.

Q Why did you file the Motion to Suppress?

A Because any opportunity one can make to limit the State's evidence where there is a legal - reasonable legal argument to be made should be made; and you have to remember we wanted to be present or listen to the discussions between Mr. Wemark and Mr. - and Doctor Taylor so we had a - we thought we had a constitutional argument to keep everything out, and we wanted to take advantage of it. So we tried to take out the statements and we tried to take out any physical evidence too.

(PCR Tr. pp. 219-36)

On cross-examination by Wemark's PCR attorney, Blink continued his testimony about disclosure of the knife.

Q (By Mr. Putnam, representing Wemark) When - You indicated you didn't find out about the knife till June 1st or 2nd?

A Yes.

Q Did you ask Mr. Wemark where the knife was prior to that time?

A I don't believe we did, Mr. Putnam.

Q You knew the knife had not been found?

A I did.

Q And when you were discussing this full case with your client, you didn't ask him where the alleged murder weapon was?

A I don't believe we did.

. . .

Q You've seen State's Exhibit 91 before?

A I believe so.

Q And that is the knife that was found in the basement?

A I believe it is.

Q And I wasn't sure in your testimony, did you see a knife in the basement?

A Yes.

Q Where did you see that knife?

A It was underneath a pile of automobile parts that was immediately beside and beneath the - the stairway that led to the basement.

Q Did you -

A It was in the basement area itself.

Q And did you have to move items to find it?

A I - I think we did. Not much.

Q And then you put those items back where they were?

A We would - we would have looked just to - just to confirm that it was there, just enough to confirm that it was there.

. . .

Q During the trial, there's some confusion over this knife and during the closing whether the knife was in the bag, out of the bag, open or closed.

Do you recall this knife being used by Mr. Miller in his closing?

A No. The one - No, I don't. I know that Judge Beeghly was extremely emphatic that any object that had blood on it remain within a closed container and, in fact, I think there's record made on that. I don't have an independent recollection; but based on Judge Beeghly's insistence, I would believe that the knife remained in the bag.

Q Do you recall whether it was open or closed?

A The knife or the bag?

Q The - the knife inside the bag.

A I - I believe it was pretty much in the condition in which it is now, with the blade folded and unexposed.

Q And if Mr. Miller made a statement to the jury in closing about this knife when opened up is a dangerous weapon, would that lead you to believe that he, in fact, opened it up in front of the jury?

A I don't have an independent recollection about that. I do remember him pounding the jury rail 15 times slowly and in a tempoed manner to represent each stab wound.

Q With the knife in his hand?

A I don't believe the knife was in his hand. If it - if it was, it was. At that point, -

Q If the record reflects that he said, "This knife stabbed again and again and again --"

A Yes.

Q " - and again (indicating) - Now, you are a professor or were -- I think you still are a professor?

A Yes.

Q Is there a theory in law that says - what - what are we taught? -- that a jury will retain more, something spoken or demonstrative evidence?

A What I teach my students is that they will remember that which is presented to them through as many senses as possible.

Q So pounding a knife on a table (indicating) would be a very good technique to have the jury remember the knife and the multiple stabbings?

A No more and no less persuasive than the photographs of all the stab wounds or the letter indicating he

was going to kill himself and his three-year-old boy. They're all the same.

Q Okay. And you haven't reviewed the closing arguments; have you?

A I haven't.

Q And I have had an opportunity to do that. This knife was mentioned multiple times, discussed about that knife, pounded on the table, and I don't recall any photographs that Mr. Miller drew the jury's attention to.

And if this knife was pounded 15 times, would that be a strong, demonstrative piece of evidence?

A It's evidence just - just like the - anything else, Mr. Putnam.

Q But for Mr. Wemark's case, it surely would have been better not to have Mr. Miller stand up there and pound that knife on the counter?

A Mr. Miller would have stood up and made the pounding demonstration whether he had the knife or not, based on - based on my personal assessment and knowledge of Mr. Miller over more than a decade.

. . .

Q Okay. You had a -

A The -

Q You had an ethical dilemma with the knife?

A Pardon me?

Q You had an ethical dilemma with the knife?

A Yes.

Q You did a memorandum to the file, Exhibit 8?

A I did.

Q Did you ever show that memo to Mr. Wemark?

A No.

Q Did you tell him you had an ethical dilemma and you were going to allow him to tell Mr. Taylor where the knife was to relieve you of your ethical dilemma?

A Let's break that down. First of all, did I ever tell him of the ethical dilemma? Absolutely. It was the second time we had been through this. We went through it the first time with the rifle.

Did we make specific statements about what he should tell Doctor Taylor? No. We told Mr. Wemark to tell the truth.

Q All right. You did not tell him anything about telling him specifically where the knife was or anything like that; correct?

A We told Mr. Wemark to tell the truth.

Q Right. You didn't discuss the knife specifically with Mr. Wemark before he was questioned by Doctor Anderson or Doctor Taylor?

A Couldn't before Doctor Anderson because we didn't know about it. He didn't tell us about it until after Doctor Anderson. But as it related to Doctor Taylor, I believe Mr. Wemark said, "Well, what do I tell him about the knife? And we said, "If they ask, you tell the truth."

Q And you didn't tell him - did - Did you tell him at that time that you'd reviewed Doctor Anderson's deposition and you were present for it and Doctor Anderson had basically blown the diminished responsibility defense right out of the water?

Did you tell Mr. Wemark that before Doctor Taylor's deposition [sic]?

A We discussed with Mr. Wemark the damage that Doctor Anderson had done in his deposition.

Q When did you discuss that with Mr. Wemark?

A Well, it - it would have been at some point in time after Doctor Anderson's deposition.

Q Were you present with Mr. Wemark at that time or was that by telephone?

A I don't recall if that was a conference call or if it was a discussion that was had, but there was another point that you raised earlier and we've - we've skipped by it.

Q I'll - I'll go back to it.

A Okay.

Q Just so I'm clear, though, on this issue, you think at some point between Doctor Taylor's deposition

[sic] and the deposition of Doctor - Doctor Anderson's deposition and the deposition [sic] of Doctor Taylor, rather, you advised Bob that Doctor Anderson's testimony was very detrimental to the diminished responsibility defense?

A Sure. We did. But at the same time, we - we discussed this question of - of impulse, because my assessment of what had occurred here was - was that Mr. Wemark had responded impulsively, not premeditatively, not deliberately, and there was at least some portion of Doctor Anderson's testimony that supported that.

Q Impulsive is different than a diminished responsibility defense?

A Yes, it is.

Q So at the time you were done with Doctor Anderson's deposition or Mr. Miller was, the diminished responsibility defense was blown apart?

A If - It was not as strong as we would hope, that's for sure; but - but as I pointed out earlier, there was a fair degree of reliance that I had in Doctor Taylor's profession - professional qualifications as well.

Q And I think you testified before that there were two reasons that you wanted him to talk to Doctor Taylor: One was help his defense and, two, to assist lawyers with their ethical obligations?

A Well, I don't know if - if that's what the transcript says, then that's what I said; but the two points, of course, were that the ethical dilemma did exist and had to be resolved in some way and the - the - a truthful statement by Mr. Wemark would have helped him.

Q It's your belief that Mr. Wemark would not have told Doctor Taylor that he didn't want to answer about the knife during that deposition [sic] or that interview?

A He could have said whatever he wanted; but, Mr. Putnam, any time a defendant tenders themself to make a statement to law enforcement and then on a critical issue decides to remain silent, I think that

reflects on their credibility because it looks like they're hiding something.

Q So you at that time believed Doctor Taylor actually was associated with law enforcement?

A Well, Doctor Taylor was retained as the State's expert; but I - but I am not willing to concede and I will not concede on this record that merely by virtue of the fact that Doctor Michael Taylor was retained as a State's expert that he would render an opinion for them simply because of that fact.

Q Well, but you already knew Doctor Anderson had rendered an opinion.

He was retained by you folks and he rendered it on behalf of the State, in essence?

A He rendered an opinion on the - on the question of the capability, the premeditation and deliberation. There's a difference between capability and whether he did, in fact, have that frame of mind; but I'm not going to quibble about it. We've made the point that Doctor Anderson's initial statement on diminished responsibility certainly wasn't helpful.

Q Did you talk to Doctor Anderson prior to his deposition?

A I believe that Mr. Sandy was the - was the one of the two of us that worked primarily with Doctor Anderson.

Q So your answer is you did not talk to Doctor Anderson -

A I -

Q - prior to his deposition?

A - think I did, but I can't be certain.

Q Do you recall him telling you what he was going to testify to then or what his opinions were going to be?

A I honestly can't tell you that, Mr. Putnam.

Q And Doctor Taylor had a copy of Doctor Anderson's deposition prior to his deposition [sic]?

A I assume he did.

Q And it's still your testimony today, despite the fact that Doctor Taylor had Doctor Anderson's deposition prior to examining Mr. Wemark and the fact that Doctor Taylor was a State's expert, that you thought he might render an opinion different than Doctor Anderson's on behalf of the defense?

A He might render an opinion different from Doctor Anderson's based on the fact that Michael Taylor is a professional.

Q And it also alleviated, by having that deposition [sic], your ethical problem?

A It also resolved the ethical issue.

Q You know that Mr. Miller made a big promotion about where the knife was hidden under the basement -

A What does - what does big promotion mean?

Q - stairs? He emphasized to the jury that Mr. Wemark had hidden the knife under the basement -

A He may well have done that.

Q - stairs. You know that Mr. Miller used that to correlate that Mr. Wemark deliberately hid the knife the same way that he deliberately killed Melissa Wemark?

A Just like he could have argued, had the knife never been disclosed, that Mr. Wemark deliberately hid the knife just like he deliberately killed Melissa Wemark.

Q The only areas you raised on the suppression and the motion, the only case you cited, - I think you cited that off the record - was the Smith v. Estelle regarding suppressing the knife?

A If that's what the record reflects.

Q Were you familiar with Craney v. State?

A If it had been - if it had been decided at that time, we may have reviewed it.

Q You sought only to suppress the evidence because you had not been allowed to be present during the interrogation - or on the scene during the interrogation of Mr. Wemark by Doctor Taylor?

A I think the motion speaks for itself, Mr. Putnam.

Q You have reviewed - Well, tell me: What have you reviewed in preparation for your testimony today?

A I believe I reviewed the boxes of material that you have reviewed. They consisted of, as I recall, two bankers boxes including notes of myself, correspondence, time records, depositions, photographs, correspondence, the DCI report. There may have been more, but they were the materials that were made available to you; -

Q Okay.

A - and they - they comprised the contents of my file.

Q All right. I guess my question was: You did go through and review those before today?

A I have - I have been through most of it. I did not read all - reread all of the depositions.

Q And if I understood correctly, you went to the house to search for the knife, moved some of the materials and found the knife, because you didn't think you could believe anything your client told you?

A I - I was concerned whether Bob was telling us the truth or not.

Q And I - I'm sorry. I might have already asked you this.

Did you at any time tell Bob that you didn't trust him or didn't believe him?

A There were times, Mr. Putnam, as I think I indicated earlier, where we had told Bob, "Bob, it just doesn't make sense," and that was usually the context in which we shared with him our views of some of the things that he told us.

Q You told him that it doesn't make sense versus, "Bob, we don't believe you"?

A Or saying -

Q We don't trust you?

A Or saying, "Bob, you're a liar," that's correct. That - that would have been counterproductive, Mr. Putnam. You - you may find a criminal defendant not to be credible, but you can't stop respecting him and you can't stop treating them like a decent human - human being should be treated.

Q Obviously, you tried to suppress the knife. You indicated that any time you can suppress evidence it's beneficial?

A Generally speaking, that's true.

Q It prevents the prosecutor from commenting on it and waving it around and saying this knife, et cetera?

A Just like suppressing evidence of brutal stab wounds would prevent the prosecutor from presenting those to the jury. Any time, I think as a general rule, you can prevent inculpatory evidence from being used, you want to try and do that.

(PCR Tr. pp. 243, 249-50, 251-53, 261-69)

Wemark's other trial attorney, John Sandy, did not testify at the PCR hearing, but gave a pre-hearing deposition that was admitted into evidence and considered by the PCR court. On the issue in question, Sandy testified, in pertinent part, as follows:

Q (By Mr. Vandermaaten, representing the State) Mr. Wemark also along these lines alleges that counsel was ineffective because you told him to tell, quote, everything, unquote, to Doctor Taylor. And I believe in the context of the rest of the pleadings, he's referring to the fact that he disclosed the location of the knife that was used to stab Melissa Wemark.

Do you recall having conversations with Mr. Wemark about the location of the knife and his obligations to disclose that location?

A Yes. To put this in context, what we have here is we have the murder weapon, which was left at the residence of where the decedent was later found. And that knife specifically was thrown or placed in a location in the basement of the residence. The location it was placed in or lodged in also had a substantial number of automotive parts located at it, and what I'm talking about is engine motors - maybe not engine motors, but carburetors, transmissions, things of this nature, wheel axles, large amounts of this type of material.

And when the DCI and the local law enforcement agencies searched the residence for what they believed to be the murder weapon, they did not locate that murder weapon. We had been informed by Mr. Wemark that that is where he thought the knife was located.

When it came to the psychiatric examination by Doctor Taylor, the question came up prior to him being examined by Doctor Taylor, what if Doctor Taylor asks you, "Where is the knife now that was used in the stabbing?" We informed Mr. Wemark then, and throughout the entire course of the matter, to be truthful and honest as to whatever he said, and Mr. Wemark was with Doctor Taylor, and then the State came in and located the whereabouts of the knife at the - you know, at the residence.

Q Why did you tell Mr. Wemark to be honest and disclose the location of that knife to Doctor Taylor?

A We told Mr. Wemark -

MR. PUTNAM: Wait. Before you finish, Mr. Sandy, it's a misstatement of the answer. Mr. Van Der Maaten added to the question that you had told Mr. Wemark to be truthful and honest and to disclose the location of the knife, which is a misstatement of the record. I believe your testimony was only that you told him to be truthful and honest.

A Correct. Well, maybe I could clear this up. We did -

MR. PUTNAM: Wait.

Q Mr. Sandy, you told Mr. Wemark to be truthful and honest?

A Yes.

Q Did you make him aware that the location of the knife may be an issue that Doctor Taylor would raise?

A Yes.

Q Why did you tell him, first of all, to be truthful and honest? And why did the issue of the knife come up in that conversation?

A I tell all of my clients to be truthful and honest because I have an ethical duty in order to make sure that they are being truthful and honest. And I believe that the Code of Professional Ethics require[s] me to do so. I knew that - we didn't know that he would ask about the knife, but we highly suspected that that was going to be something that was brought up because the purported murder weapon was never located.

I believe that the search warrant of the residence after the finding of the body included locating a large number of knives, and I think some testing was done on those knives, and - by the DCI lab. My recollection is that none of those knives proved to contain any of the bodily fluids, blood or otherwise, to show that they were the knife used in question.

Also, in terms of talking with law enforcement officers, that was one of the questions that they kept asking us, where is the knife? And - to Rob and I, and we felt that that was going to be one of the issues that was raised in this psychiatric interview by Doctor Taylor.

Q Did you feel that disclosure of the knife could be used to any tactical advantage for Mr. Wemark?

A We felt two things. I mean, we - Rob Blink and I sat down and discussed at great lengths our ethical obligations concerning the knife as it relates to what to do with the knife, because we had some real grave concerns about those ethical obligations as it related to the knife as it being a part of this crime investigation.

We felt, again, akin to the gun situation, that law enforcement location of the knife where Mr. Wemark said the knife was would help to bolster Mr. Wemark's credibility.

Mr. Wemark made some incriminating statements when he was first arrested which were not credible in light of the physical evidence that was found. What I'm specifically referring to here is a statement by Robert Wemark that his wife fell on the knife. Compared to the physical evidence of multi number of stab wounds, didn't bring a lot of credibility to Mr. Wemark.

We felt that Mr. Wemark's statement of where the knife was and finding the knife there would help his credibility, and also at the same time hurt the credibility and impeach the manner in which law enforcement in this case handled the investigation of this case in that they obtained a search warrant, searched the residence, and did not locate the knife when they searched the residence initially.

When they went back after having Doctor Taylor's examination of Mr. Wemark completed, they found

the knife exactly where Mr. Wemark said the knife would be located. So it was kind of a - I would say a dual purpose of how we handled that situation.

(Sandy Depo. pp. 14-18) On cross-examination by Wemark's attorney, Sandy testified further as follows:

Q (By Mr. Putnam, representing Wemark) The next question has to do with the knife. When did you first ask Mr. Wemark where the knife was located?

A I don't know the date.

Q Would that also be a question that you would have - you would have asked him early on?

A Yes, where the knife was, whether the State had seized it already. It would be something that we wouldn't - I don't know whether Mr. Wemark would know whether they had the knife or not because they seized a large volume of evidence, and there was - and it was only after we would go through the evidence that he would be able to tell us whether that was - whether that knife was seized or not seized.

Q I'm assuming, Mr. Sandy, that one of the questions you asked Mr. Wemark early on was what happened to the knife?

A Yes.

Q Did he tell you at that point what happened to the knife?

A Yes.

Q Can you tell me why - or do you recall filing a motion to suppress the knife, once it was found, following Doctor Taylor's interview?

A I can't tell you that.

Q Do you recall the motion to suppress being filed?

A On the knife? Yes, one was - I believe one was filed by Robert Blink, and then my name was involved on it on a motion to suppress that was filed June 16th.

Q Mr. Sandy, the idea behind the motion to suppress was to keep the knife from being displayed to the jury; correct?

A That's correct.

Q Why did you file a motion to suppress the knife if you wanted to use the late finding of the knife as a tactical advantage to Mr. Wemark, as you have testified previously?

A Because we believed that the use of the knife at trial - that its value to the State in showing the knife to the jury would have a negative impact on Mr. Wemark's defense of the case.

Q Did you advise him of that, sir?

A Yes.

Q When did -

A We discussed the fact that them finding the knife, that they were going to be parading around the knife.

Q And that outweighed any tactical advantage, by being able to say the State failed to find it right away; correct?

A I think it did, yeah.

Q So when Mr. Wemark spoke to the doctor, Mr. Taylor, and I understand you told him to tell the truth, which you should, and which he should, could you have also advised him that he had the right not to tell Mr. Taylor where the knife was located?

A We discussed the fact that if Mr. Wemark was going to rely on the defense, that he would have to be candid and talk to the psychiatrist.

Q Mr. Sandy, my question was, could you have advised Mr. Wemark to refuse to answer the question from Doctor Anderson [sic] regarding where the knife went?

A Could we have advised Mr. Wemark to not answer the question? Yes, we could have.

Q Now, when did you take - when was Mr. Wemark examined by his doctor, or the defendant's doctor?

A It was over the period of May 18th to June 17th. And the reason I point to that period is that is over the time frame that he was here in Dickinson County, and I know that we had had the psychiatrist come here to see Robert Wemark while he was in our facility.

Q Did your psychiatrist - first of all, did you and Mr. Blink find a psychiatrist for Mr. Wemark?

A We contacted a psychiatrist concerning Mr. Wemark's case, and retained his services in reference to this case, correct.

Q Was that done before or after Mr. Taylor's interview of Mr. Wemark?

A That was done before.

Q And, in fact, was Mr. Anderson the doctor that examined Mr. Wemark on behalf of Mr. Wemark?

A Yes.

Q And, in fact, was his deposition taken before Doctor Anderson [sic] examined him?

A I don't know the specific dates. I can't answer that question.

Q Well, if I told you that Mr. Anderson's deposition was conducted five days prior to Taylor examining Mr. Wemark, would you have any reason to doubt that?

A No, sir.

Q Following Mr. Anderson's deposition and interview of Mr. Wemark, did you feel that you had a worthwhile expert at that time?

A We did.

Q And you felt that you could proceed ahead with the diminished capacity defense?

A We did.

Q Why was that defense withdrawn then?

A After Doctor Taylor's interview of the defendant, and his analysis of the situation, we discussed the effect as to not only both witnesses testifying, you know, which side the jury would feel is most

compelling, but we also at that point, I think, had Doctor Anderson reevaluating his position somewhat in terms of falling back on us, agreeing with certain items that Doctor Taylor had stated, to the point to where we sat down with Mr. Wemark and discussed the problems with Doctor Anderson testifying, with Doctor Taylor testifying, and concluded to not pursue that course.

Q When was that decision made?

A I don't have the date for that.

Q Was it made prior to trial?

A Yes.

Q Do I understand then, Mr. Sandy, that after Doctor Anderson testified, that somehow you had further communication with him or sent him additional materials to review?

A I think what we did, and I don't have them in front of me, is after we got either Doctor Taylor's report or deposed Doctor Taylor, that we provided Doctor Anderson with a copy of that to review it. And then spoke with Doctor Anderson after he had an opportunity to review that.

Q You indicated you were fearful, and the reason you filed the motion to suppress the knife, was the State would obviously be able to introduce the knife at trial?

A Correct.

Q Did they do so?

A I believe they did, yes.

Q And did that have an impact on the jury as far as your perceptions?

MR. VANDERMAATEN: Objection, speculation.

Q You can go ahead and answer.

A It was done by Mr. Miller in a less offensive way than it possibly could have been done, but any time you have the murder weapon in front of the jury, it has a negative impact.

Q So had the murder weapon not been placed in evidence in front of the jury, would you believe that Mr. Wemark's chance for a lesser degree conviction had been greater than with the murder weapon placed in front of the jury?

A I don't think - again, this is getting to my personal opinion, I don't think that the knife itself in front of the jury would have had the jury conclude that he should be convicted of a lesser degree. And I say that because we had autopsy photos that were produced in front of the jury that were pretty gruesome in terms of showing the multiple stab wounds.

We had Doctor Bennett's testimony concerning how long the decedent may have lived after the wounds were inflicted. I think - again, this is my own opinion, that looking at the whole amalgam of evidence, that with or without the knife in front of the jury, that it wouldn't have had a material bearing on their decision as to whether to convict Mr. Wemark of first or second degree because of this other evidence.

Q If somebody hides something, is that a deliberate action?

A If somebody hides something, is that a deliberate action? Is that your question?

Q Yes, sir.

A I believe so.

Q And so when the jury heard that after two days of searching for the knife, it wasn't found, and then heard where it was found hidden under some auto parts in the basement, would the jury naturally infer that Mr. Wemark made a willful and determined effort to hide the knife?

MR. VANDERMAATEN: I'm going to object again. It's speculation as far as what the jury did or did not infer as a result of the evidence submitted. For that reason, the answer is not admissible.

Q You can go ahead and answer, please.

A Can you read that back to me again?

(Requested portion of the record was read.)

A I don't - you know, perhaps I am - this is, of course, four years after the fact, but I don't know that it came in as hidden under auto parts. I think it was that it was thrown within a set of auto parts in the basement.

Q Well, Mr. Sandy, who testified that it was thrown within auto parts in the basement?

A My understanding is that the DCI or law enforcement testified as to locating the knife, and that they had received that information, and I think there was -

Q But, sir -

A If I'm not mistaken, wasn't there a stipulation concerning the location and the - how the knife was found, something of that nature. I don't have the transcript of the trial in front of me. I didn't do the appeal. But I think there was some discussion as to the - how the knife was located and things of that

nature that was entered into at trial.

Am I mistaken there, fellows?

Q And it's your belief that when the knife couldn't be found because it was under items, that the jury wouldn't infer that that was a deliberate action on behalf of Mr. Wemark?

A Well, I think that there is two components to that. One is that he placed the knife there, and two is that it was somehow hidden there, and as I said, maybe I'm wrong, but I think we entered into a stipulation concerning how the knife would be disclosed in terms of its being brought in, and it didn't connote that he somehow had the time to go there and hide it underneath parts, but we did get into the situation where it was placed there by the defendant, and we spoke about that, as my memory serves me, as being a person who is very distraught over what has just transpired and threw the knife or whatever in that location as a distraught person would do.

Q You also testified that you thought it would, quote, bolster Bob's credibility if he told them where the knife was. Is that correct, Mr. Sandy?

A I said that in terms of his credibility, it had been significantly damaged with his previous statements, and that Bob's response, being truthful as to the location of the knife, would bolster his credibility.

. . .

Q When did you and Mr. Blink determine you had an ethical problem regarding the knife?

A I believe we decided we had an ethical issue from the moment he told us where it was at.

Q And I'm assuming, as you previously testified, that was right away during the interviewing process?

A Again, you know, whenever it was that he brought it out to us, where the knife was.

Q Why is it that -

A Here is the problem. Let me explain. Because they had did a search of the residence. Law enforcement had done a search of the residence. So we didn't know immediately whether they had located the knife or not. It was not until we had looked at the evidence and did the deposition of the various law enforcement officials that we concluded they hadn't found the knife, and that the knife was still at the residence.

Q Wasn't Knudson and Miller asking you where the knife was? I thought you testified to that.

A No. I think I said - maybe I'm wrong, I think the issue did come up. I don't know whether it was Knudson or maybe it was Deputy Carey as to the knife. It may have been Mr. Miller. I can't - you know, it did come up from one of them as to where the knife was located.

(Sandy Depo. pp. 43-52, 63-64)

On redirect examination, Sandy testified further as follows:

Q (By Mr. Vandermaaten) Mr. Putnam asked you about the evaluation by Doctor Taylor and asked if you could have told Mr. Wemark to refuse to answer the question about the location of the knife. Do you recall that question?

A Yes.

Q Did you see a down side to directing Mr. Wemark to refuse to answer that way?

A Well, you know, I think two things. One, I think there is some cases that stand for the proposition that if you're going to use this defense, you have to, you know, make yourself - provide the testimony to the other side's psychiatrist, or if you don't, you lost that defense.

Two, you lose any credibility that you're trying to create there. But I think that eventually, either you answer the question or if you refuse to answer it, then that's grounds for them coming in and saying, "Hey, he didn't fully comply with that. We don't want him to use that defense because he's not providing testimony."

Q Did you discuss with the defendant your recommendation to withdraw the diminished responsibility defense?

A Yes.

Q And did he concur in that decision?

A Yes.

Q You testified that he had emotional problems while you were representing him. Do you believe that he understood these recommendations that you were making, and that he was making an informed decision as far as trial tactics and procedures and so on?

A Without a doubt.

(Sandy Depo pp. 79-80)

This concludes a recitation of the evidence applicable to the court's decision in this case. The court now turns to examination of the applicable law. As noted previously, the basic issue in this case is not whether Wemark's trial counsel was ineffective. The Iowa Supreme Court held that was the case. Although the State argues otherwise, the Iowa Supreme Court clearly was correct.[(8)] Thus, the only remaining issue is whether the ineffectiveness of Wemark's counsel prejudiced Wemark to the extent requiring *habeas* relief.

2. Applicable law

The law applicable to Wemark's claim begins with and flows from *Strickland v. Washington*, discussed briefly at page 7, *supra*. As noted above, the Supreme Court established two requirements for a showing of ineffective assistance of counsel. The first, that counsel's performance was deficient, has already been decided. The second requires a showing of prejudice. The prejudice prong requires a petitioner to show counsel's errors "actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or

omission of counsel would meet that test." *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067. *See Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997)). Rather, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

In short, a conviction or sentence will not be set aside "solely because the outcome would have been different but for counsel's error, rather, the focus is on whether 'counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" *Mansfield v. Dormire*, 202 F.3d 1018, 1022 (8th Cir. 2000) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)). In the final analysis, "an accused is only entitled to a fair trial, not a perfect one." *State v. King*, 256 N.W.2d 1, 12 (Iowa 1977) (citing *Schneble v. Florida*, 405 U.S. 427, 432, 92 S. Ct. 1056, 1060, 31 L. Ed. 2d 340 (1972); *State v. Kelsey*, 201 N.W.2d 921, 927 (Iowa 1972)).

A petitioner ordinarily must satisfy both prongs of *Strickland* in order to prevail on an ineffective assistance of counsel claim. *See id.*, 466 U.S. at 687, 104 S. Ct. at 2064. In this case, however, Wemark contends prejudice should be presumed due to "[t]he actual breakdown of the adversarial process[.]" (Doc. No. 13 at 6, citing *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 2041, 80 L. Ed. 2d 657 (1984).)

The United States Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25, 104 S. Ct. 2039, 2047 n.25, 80 L. Ed. 2d 657 (1984) (citations omitted). Cases of the former type are not relevant here; Wemark's counsel was never totally absent during any of the proceedings. Relative to the second type, where counsel was "prevented from assisting the accused during a critical stage of the proceeding," none of the cases cited by the *Cronic* Court is relevant here. *See id.*, citing, *inter alia*, *Herring v. New York*, 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975) (counsel in non-jury trial was denied right to make summation of evidence before judgment); *Brooks v. Tennessee*, 604 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972) (holding Tennessee statute unconstitutional which required defendant to testify as first defense witness or not at all, depriving defendant of counsel's guidance as to when, and whether, to testify); *Ferguson v. Georgia*, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961) (invalidating Georgia statute that denied defendant of right to have counsel question him to elicit unsworn statement).

The *Cronic* Court also found the adversary process itself would be presumptively unreliable where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047.[(9)] By way of example, the Court cited *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (defendant prevented from cross-examining prosecution witness regarding juvenile record), upon which the Court relied in *Smith v. Illinois*, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968) (defendant prevented from asking prosecution witness about his name and address), and *Brookhart v. Janis*, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966) (attorney agreed to "prima facie trial," which denied defendant right to confront and cross-examine witnesses). Neither *Davis* nor the cases upon which the *Davis* Court relied can be read to require a presumption of prejudice in this case.

The *Cronic* Court noted that apart from circumstances involving the complete denial of counsel, or the complete failure of counsel to subject the prosecution's case to meaningful adversarial testing, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, 466 U.S. at 659 n.26, 104 S. Ct. at 2047 n.26 (citing, *inter alia*, *Strickland*, 466 U.S. at 693-94, 104 S. Ct. at 2067-69; other citations omitted). In *Strickland*, decided the same day as *Cronic*, the Court provided further guidance on this issue:

One type of actual ineffectiveness claim warrants a . . . limited[ ] presumption of prejudice. In *Cuyler v. Sullivan*, 466 U.S. [335], 345-350, 100 S. Ct. [1708], 1716-1719, [64 L. Ed. 2d 333 (1980)], the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, [citation omitted], it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims [of actual or constructive denial of counsel, or state interference with counsel's assistance]. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan, supra*, 466 U.S., at 350, 348, 100 S. Ct., at 1719, 1718 (footnote omitted).

Strickland, 466 U.S. at 692, 104 S. Ct. at 2067.

In *Cuyler v. Sullivan*, the Court observed, "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Cuyler*, 446 U.S. 335, 346, 100 S. Ct. 1708, 1717, 64 L. Ed. 2d 333 (1980). *Cuyler* dealt with an attorney's representation of multiple defendants who arguably had conflicting interests. The Court held that although the mere possibility of a conflict would be "insufficient to impugn a criminal conviction," 446 U.S. at 350, 100 S. Ct. at 1719, where a defendant can show "that a conflict of interest actually affected the adequacy of his representation [then he] need not demonstrate prejudice in order to obtain relief." 446 U.S. at 349-50, 100 S. Ct. at 1719 (citing *Holloway v. Arkansas*, 435 U.S. 475, 487-91, 98 S. Ct. 1173, 1180-82, 55 L. Ed. 2d 426 (1978); *Glasser v. United States*, 315 U.S. 60, 72-75, 62 S. Ct. 457, 465-67, 86 L. Ed. 680 (1942)).

An interesting question arises in the present case regarding whether Wemark's attorneys' actions to remedy their perceived 'ethical dilemma' raised a conflict of interest between the attorneys themselves and Wemark, as their client. Certainly, some of the same considerations apply; in the present case, "the evidence of counsel's 'struggle to serve two masters [cannot] seriously be doubted.'" *Cuyler*, 446 U.S. at 349, 100 S. Ct. at 1718 (citation omitted). The Supreme Court has never considered a set of facts similar to those in Wemark's case. The Supreme Court cases involving conflicts of interest largely have dealt with multiple representation. However, the Court has recognized the possibility that

there may be exceptional cases in which counsel's performance falls so grievously far below acceptable standards under *Strickland*'s first prong that it functions as the equivalent of an actual conflict of interest, generating a presumption of prejudice and automatic reversal.

Lockhart v. Fretwell, 506 U.S. 364, 386, 113 S. Ct. 838, 851, 122 L. Ed. 2d 180 (1993) (Stevens, J., dissenting).

The Court considered the presumed prejudice argument in the context of an actual (as opposed to a misperceived) ethical dilemma in *Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). During trial preparation, Whiteside indicated to his attorney that he planned to testify falsely. Whiteside's attorney advised him such testimony would constitute perjury, and if Whiteside so testified, the attorney would have an ethical obligation to inform the court and seek to withdraw, and could be called to testify to rebut the perjury. Whiteside testified truthfully at trial, and was convicted of second-degree murder. Whiteside claimed in post-trial proceedings, in state proceedings challenging his conviction, and in his federal *habeas* action that his attorney was ineffective in advising him not to testify as he had planned.

The United States District Court for the Southern District of Iowa denied Whiteside's petition. The Eighth Circuit Court of appeals reversed and directed that the writ be granted. Specifically, the Eighth Circuit "concluded that *Strickland*'s prejudice requirement was satisfied by an implication of prejudice from the conflict between Robinson's duty of loyalty to his client and his ethical duties." *Whiteside*, 475 U.S. at 163, 106 S. Ct. at 992. The United States Supreme Court reversed, holding, in pertinent part, as follows:

Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.

. . .

We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry. Although a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S., at 694, 104 St. Ct., at 2068. According to *Strickland*, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* . . .

. . .

In his attempt to evade the prejudice requirement of *Strickland*, Whiteside relies on cases involving conflicting loyalties of counsel. . . . Here, there was indeed a "conflict," but of a quite different kind; it was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony without which, as he put it, "I'm dead." This is not remotely the kind of conflict of interests dealt with in *Cuyler v. Sullivan*. Even in that case we did not suggest that all multiple representations necessarily resulted in an active conflict rendering the representation constitutionally infirm.

Whiteside, 475 U.S. at 175-76, 106 S. Ct. at 998-99.

In his concurring opinion, joined by three other Justices, Justice Blackmun discussed further the types of cases in which prejudice should be presumed. On the particular facts presented by Whiteside, Justice Blackmun noted:

The touchstone of a claim of prejudice is an allegation that counsel's behavior did something "to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S., at 678, 104 S. Ct., at 2064. The only effect [Whiteside's attorney's] threat [that he would move to withdraw if Whiteside testified as indicated] had on Whiteside's trial is that Whiteside did not testify, falsely, that he saw a gun in [the victim's] hand. [FN4] Thus, this Court must ask whether its confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony. *See id.*, at 694, 104 S. Ct., at 2068.

FN4. This is not to say that a lawyer's threat to reveal his client's confidences may never have other effects on a defendant's trial. *Cf. United States ex rel. Wilcox v. Johnson*, 555 F.3d 115 (3d Cir. 1977) (finding a violation of Sixth Amendment when an attorney's threat to reveal client's purported perjury caused defendant not to take the stand at all).

. . .

In the face of these dangers [inherent in Whiteside's proposed testimony about seeing a gun or something metal in the victim's hand], an attorney could reasonably conclude that dissuading his client from committing perjury was in the client's best interest and comported with standards of professional responsibility. [FN7]

FN7. This is not to say that an attorneys' ethical obligations will never conflict with a defendant's right to effective assistance. For example, an attorney who has previously represented one of the State's witnesses has a continuing obligation to that former client not to reveal confidential information received during the course of the prior representation. That continuing duty could conflict with his obligation to his present client, the defendant, to cross-examine the State's witnesses zealously. [Citation omitted]

Whiteside, 475 U.S. at 184, 188, 106 S. Ct. at 1003, 1005 (Blackmun, J. concurring).

Justice Blackmun discussed the Third Circuit's opinion in *United States ex rel. Wilcox v. Johnson*, 555 F.3d 115 (3d Cir. 1977), a case that also involved the possibility that a defendant might testify falsely. The *Wilcox* court noted:

While defense counsel in a criminal case assumes a dual role as a "zealous advocate" and as an "officer of the court," neither role would countenance disclosure to the Court of counsel's private conjectures about the guilt or innocence of his client. It is the role of the judge or jury to determine the facts, not that of the attorney.

It is essential to our adversary system that a client's ability to communicate freely and in confidence with his counsel be maintained inviolate. When an attorney unnecessarily discloses the confidences of his client, he creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation.

Wilcox, 555 F.2d at 122. *See Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) ("[T]he assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" (Citation omitted.))

3. Application of Law to Wemark's case

The question of whether prejudice should be presumed in this case is less than clear. Supreme Court case law suggests, at least by implication, that Wemark's trial attorneys might have had a conflict of interest because of a misunderstanding of their ethical obligations to Wemark and to the court. The State suggests the court need not reach the issue at all, arguing it is unexhausted and procedurally defaulted. The court finds nothing in this record to indicate the Iowa Supreme Court was given a fair opportunity to address the presumption of prejudice issue. It was not raised in Wemark's briefs to the courts below, which may be deemed waiver of the issue. Iowa R. App. P. 14(a)(3) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.") Although Wemark alleges the issue "was argued before the state court" (Doc. No. 24, p. 2), the court has found nothing in the record to support this contention. The PCR hearing, which was transcribed, contains no argument whatsoever on the issue of presumed prejudice, and the Iowa Supreme Court opinion contains no reference to the issue. The court concludes Wemark failed to fairly present the merits of the issue to the Iowa courts for determination. Consequently, the issue is unexhausted and procedurally defaulted, and there is no presumption of prejudice.

The court turns to the second prong of *Strickland*; that is, whether the inadequate performance of Wemark's trial counsel in advising him to disclose the knife's location constituted prejudice. The court has reviewed the entire record, including the trial transcript. While it is true the knife was an integral part of the State's evidence at trial, this court agrees with the lower court's decision that there was ample evidence from which a jury could have found Wemark guilty of first-degree murder, even had the State not had the benefit of placing the murder weapon itself into evidence. The Iowa Supreme Court performed a detailed prejudice analysis, examining the profusion of evidence presented against Wemark at trial. This court finds the Iowa court's decision was neither contrary to applicable law nor an unreasonable application of that law.

Therefore, the court concludes Wemark's petition should be denied.

III. CERTIFICATE OF APPEALABILITY

A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal habeas petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998).

Wemark has raised issues which might constitute a substantial showing that he was deprived of a constitutional right. Therefore, the court recommends a certificate of appealability be granted.

IV. CONCLUSION

IT IS RECOMMENDED, unless any party files objections[(10)] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that Wemark's petition be denied, and judgment be entered in favor of the State and against Wemark.

IT IS SO ORDERED.

DATED this 14th day of June, 2001.

_____

PAUL A. ZOSS

MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

1. "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1).

2. The portions of the record set forth here are not comprehensive, in that they do not include every time the knife was mentioned during the course of the proceedings. Rather, the court has set forth portions of the record relevant to a discussion of Wemark's claim that disclosure of the knife had a substantial impact on his conviction.

3. Motion to Suppress filed June 17, 1993, in *State v. Wemark*, Winneshiek Co. No. C-3111, Fayette Co. No. 45136. *See* Transcript of Proceedings from the hearing on pretrial motions, June 18, 1993, at pp. 26-38.

4. Quotations from "Ruling on Defendant's Motions to Suppress," filed June 21, 1993, contained in the appellate Appendix in *State v. Wemark*, Iowa Sup. Ct. No. 93-1276, at pp. 560-61.

5. There are actually two different knives involved in the following recitation of events. One was a pocketknife found on the floor with some other items in the room where Wemark was found by officers. The other is the knife allegedly used to stab Melissa Wemark. For purposes of clarity, this opinion will refer to "the knife" as the murder weapon, and "the pocketknife" as the knife found with Wemark.

6. A stipulation relating to the knife's discovery was read to the jury, quoted *infra* at page 19.

7. There was brief testimony by DCI Agent Terry C. Johnson regarding whether officers had seized any knives at the Shorey residence. At trial, the officer stated they did seize a knife, while at his deposition, he had not recalled seizing a knife. *See* Trial Tr. pp. 608-09.

8. In his PCR testimony, Wemark's trial counsel characterized his decision in terms of an "ethical dilemma" that required him to disclose, in some manner, the knife's location. The Iowa Supreme Court correctly held such was not the case; not only were counsel not required to disclose the knife's location, it was a violation of Wemark's right to effective assistance of counsel for them to advise Wemark to do so.

Counsel also repeatedly stated he could not have advised Wemark not to discuss the knife to Dr. Taylor, noting, for example:

[W]hen the Fifth Amendment is waived, the Fifth Amendment is waived. There is no in between. There is no diluted right to remain silent. The right is either exercised or the right is waived; and it - it would have been inappropriate, I think, to counsel a client under those circumstances that you could say whatever you wanted but when you didn't - when you didn't want to talk about a particular fact you should just be quiet.

(PCR Tr. p. 228) Without getting into a full discussion of the law, which is not relevant here, the court simply notes this conclusion is erroneous. A defendant's Fifth Amendment rights may be waived only as to certain issues, or waived completely and then reasserted. *See Miranda v. Arizona*, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 1627-28, 16 L. Ed. 2d 694 (1966) ("If [a defendant] indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."); *United States v. Soliz*, 129 F.3d 499, 504 (9th Cir. 1997) ("A person in custody may selectively waive his right to remain silent by indicating that he will respond to some questions, but not to others." Citations omitted.).

Counsel advanced two other reasons for advising Wemark to disclose the location of the knife to Dr. Taylor. First, he stated he hoped Dr. Taylor might have rendered an opinion helpful to Wemark's position. The likelihood of the State's psychiatrist finding diminished capacity where Wemark's own psychiatrist previously had concluded no diminished capacity was too remote to justify having Wemark disclose the location of the murder weapon to the prosecution. Second, counsel said he wanted to give Wemark one more chance to give a truthful statement to the prosecution to help bolster Wemark's

credibility. This reason for disclosing the location of the murder weapon also is without merit. Because the defense apparently never had any intention of putting Wemark on the stand, his credibility was not in issue.

9. This "meaningful adversarial testing" also may be absent "on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659-60, 104 S. Ct. at 2047 (citing *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)).

10. Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).